

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For the Period
From July 1, 1964
Through September 30, 1964
VOLUME 116

RICHMOND M. FLOWERS, Attorney General



T. O. "TILLIE" WALKER
AND E D WALKER

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period
From July 1, 1964
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**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from July 1, 1964 through September 30, 1964, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

RICHMOND M. FLOWERS
Attorney General

RICHMOND M. FLOWERS

Attorney General

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OPINIONS

July 7, 1964

Honorable David W. Crosland
Solicitor, 15th Judicial Circuit
Montgomery County Court House
Montgomery, Alabama

Gaming and Lotteries — Criminal Law.

A sales promotion plan, sponsored by a soft drink manufacturer, that places pictures of professional football players under the caps of each and every one of its bottled drinks and gives a prize to the one collecting the football players' pictures of certain designated squads, does not constitute a lottery within the purview of Title 14, Section 275, et seq., Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of June 22, 1964 presents the question as to whether the program outlined in the following letter to you from the law firm of Steiner, Crum & Baker, Montgomery, Alabama, dated June 16, 1964, constitutes a lottery in violation of Title 14, Section 275, et seq., Code of Alabama 1940, Recompiled 1958:

"Today we discussed with you a contemplated program of the Coca Cola Company. Under an arrangement between the National Football League, on the one hand, and the Coca Cola Company and Bottlers on the other, pictures of players on the NFL Pro Bowl players will be featured under the crowns of each and every Coca Cola and Sprite bottled drinks. An equal number of pictures of each player will be purchased and distributed. Individuals who collect a set of pictures of all the players on the Pro Bowl squads can turn them in and receive an award, presently proposed to be an NFL Coach's Cap. If that individual collects say five or six (the exact number of which is not now known) of the pictures of the squads, he will receive a football.

"Since there is in no way a controlled number of awards because an equal number of each player will be distributed, and since no one picture is worth more than any other picture, we doubt that this would be a prohibited lottery or gift enterprise within the meaning of Alabama law, since the element of chance does not exist here any more than it does in the trading stamp field. Nevertheless, the Company is anxious to comply with Alabama law. Some of the applicable authorities are: Section 65, Alabama Constitution 1901; *Grimes v. State*, 235 Ala. 192, 178 So. 73; *Clark v. State* (Ala. App.) 80 So.2d 308, cert. den. with Opinion 262 Ala. 462, 80 So.2d 312; *Minges v. City of Birmingham*, 251 Ala. 65, 36 So.2d 93; *Try-Me Bottling Co. v. State*, 235 Ala. 207, 178 So. 231;

F.C.C. v. American Broadcasting Co. 347 U.S. 284, 98 L.Ed. 699."

I am of the opinion that, under the facts stated, the inquiry should be answered in the negative.

The courts of this state have defined a "lottery," or scheme in the nature of a lottery, as a plan in which a prize is set up and awarded by chance for the right to participate in which a consideration is paid. A lottery has three elements: (1) a prize (2) awarded by chance (3) for a consideration.—**Grimes v. State**, 28 Ala. App. 4, 178 So. 69. See also **Grimes v. State**, 235 Ala. 192, 178 So. 73; Quarterly Report of Attorney General, Volume 49, page 30.

Under the facts presented, there is no question of the existence of the element of (1) a prize. As to the (2) award being made by chance and (3) for a consideration, very questionable situations are presented. Here the element of chance consists merely of the possible winner receiving, collecting, and presenting certain individual pictures of pro football players, which may constitute certain designated squads entitling him to a prize. There is no drawing of any type to determine the winner by lot. As to the element of a consideration, the beverage in question is bought by the prospective winner at the regular retail price, and all of the drinks in question have pictures of players under the crowns thereof. Each crown contains a picture of some individual player which could be redeemable for the proposed prize. These pictures, in my judgment, are more in the nature of trading stamps. As to these two elements of a lottery, it is my judgment that neither the element of an (2) award being made by chance nor the element of (3) for a consideration is sufficient to label the operation a lottery.—**Clark v. State**, 262 Ala. 462, 82 So.2d 312; **Clark v. State**, 38 Ala. App. 78, 80 So.2d 308; Quarterly Report of Attorney General, Volume 91, page 25; Quarterly Report of Attorney General, Volume 57, page 86. See also Opinions of Attorney General to Honorable Forrest L. Adams, Solicitor, Twentieth Judicial Circuit, Dothan, Alabama, dated May 14, 1964 and June 1, 1964 and June 16, 1964 (Ms.).

The foregoing is merely an expression of my opinion in regard to the facts presented. It must be borne in mind that the ultimate determination of the question involved turns upon the facts in each situation. Such determination is one that falls within the province of the court or jury when presented in a proper forum. It is not a matter upon which this office may conclusively decide. Quarterly Report of Attorney General, Volume 91, pages 23 and 37.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

July 9, 1964

Hon. Clyde C. Cargile
Judge of Probate
Fayette County
Fayette, Alabama

Sheriffs — Costs and Fees — Jails — Municipalities —
Prisons and Prisoners — Counties.

1. The county is not required to pay rent and utilities for the Sheriff's private home.
2. Removal of prisoners accomplished under Title 45, Section 133, Code of Alabama 1940, payable under the provisions of Title 11 Section 100, Code of Alabama 1940.
3. A municipality may require the county to pay costs of feeding prisoners, and a charge for the use and occupancy of the city jail under a contract in accordance with Title 37, Section 471, Code of Alabama 1940.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of June 29, 1964, is as follows:

"As of June 15, 1964, Fayette County started plans for building a new Fayette County Office Building. This made it necessary to demolish the present jail. The Sheriff who had lived in the old jail, moved out to a private house in town. The prisoners will be kept and fed by the city of Fayette. Those getting jail sentences will be kept in the new Jail at Carrollton, Alabama. This situation raises several problems about which I would like an official opinion from your Office relative to making the necessary adjustments during this period of time while there are no Jail facilities in Fayette County.

"1. Is the County obligated to pay rent for the Sheriff in this private home? (This applies to utilities and etc.)

"2. Is the County obligated to pay the expenses incurred for transporting prisoners the additional mileage to Carrollton, Alabama, and if so how much?

"3. What expenses to the City of Fayette will Fayette County be required to pay for the use of the City Jail and the Feeding of the Prisoners?"

Question 1: I have been unable to find any direct authority authorizing the county to lease a home for the Sheriff, and this office holds that a county is not authorized to expend funds for the construction of a building to be used as living quarters by the Sheriff. See Biennial Reports of the Attorney General, 1934-36, page 451, and

Quarterly Report of Attorney General, Volume 2, page 4. It has even been held that a Sheriff may not accept money from the county for the use of his kitchen in preparing food for prisoners. Quarterly Report of Attorney General, Volume 8, page 340; Biennial Report of the Attorney General, 1936-38, page 420. Furthermore, there is no authority for a county to pay the Sheriff's fuel, light and water expenses, even where the Sheriff's residence is connected with the jail; Quarterly Report of Attorney General, Volume 6, page 113.

An office, but not a dwelling, for the Sheriff is provided by Title 12, Section 12(1), Code of Alabama 1940, which states in part:

"* * * In the event the courthouse is inadequate to supply office rooms * * * the court may lease such office rooms in a convenient location in the county site and to pay the rental from the county fund. * * *"

Therefore, the county is not authorized to pay rent and utilities for the Sheriff incurred in his private home.

Question 2: Prisoners upon getting jail sentences in Fayette County may be removed to the nearest sufficient jail in any other county under the authority of Title 45, Section 133, Code of Alabama 1940. Payment for such removal should: "be taxed against and paid by such prisoner on conviction or, if he is insolvent * * * by the county in which the offense was committed * * *." Title 11, Section 100, Code of Alabama 1940. For your further guidance see my opinions printed in Quarterly Report of Attorney General, Volume 111, page 73 and Quarterly Report of Attorney General, Volume 112, page 15.

Question 3: It is my opinion that a municipality may require a county to pay in addition to the cost of feeding the prisoners a charge for the use and occupancy of the city jail. A contract between the governing body of the county and the governing body of the city for such feeding, use and occupancy is authorized by Title 37, Section 471, Code of Alabama 1940.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

July 13, 1964

Hon. Grady M. Ellison
City Clerk and Treasurer
City of Fairfield
Jefferson County
Birmingham, Alabama

Municipal Corporations — Elections.

Municipal Elections are held and conducted under the provisions of Act No. 663 and Act No. 664, General

Acts 1961, Pages 827 and 868, respectively, unless a particular municipality has a special law applicable to it and it alone.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 17, 1964, is as follows:

"Your official opinion is requested as follows: Shall the City of Fairfield pay the election officials the amount of \$8.00 as provided by Act No. 663 of the regular session of 1961 for the performance of their duties at the election held on August 11, 1964, in which voting machines will be used; or shall the City of Fairfield pay the election officials the additional \$3.00 as provided in Title 17, Section 103 (1); or shall the City of Fairfield pay the election officials the amounts provided in Section 1053(3) of the appendix. The resolution from the City Council of Fairfield requesting the above information is enclosed.

"Also, your official opinion is hereby requested as to the number of election officials which must be appointed by the Fairfield City Council to serve at the polls at the election to be held on August 11, 1964. The City is providing, for the benefit of the voters, two machines in each of six wards. In the past, the City has appointed five or six election officials for each polling place. Act 663 of the 1961 regular session provides for four officials for each voting machine. The City will have two machines at each voting place, for the accomodation of the voters, this is not necessarily required since the total number of voters in Fairfield is 3,970. The City would like to appoint five or six officials for each voting place.

"Your official opinion as to the number officials required will be greatly appreciated. We would like your answer as soon as possible in order for the City to contact eligible officials to be trained at the voting machine school."

The Legislature of Alabama in 1961 passed Acts Nos. 663 and 664 dealing with municipal elections. The first act is applicable to those municipalities organized under a mayor-council form of government and the latter act is applicable to those municipalities having a population of 300,000 inhabitants or less which are organized under a commission form of government. One of the principal purposes for enacting these acts was to bring about uniformity in municipal elections. These acts are full and complete and cover all of the points raised by you in the above request. These acts are special laws dealing with special subjects, viz., municipal elections.

It is a well known rule of statutory construction that where a special act deals with a special subject, such special act will prevail

over a general act dealing with the same general subject as that covered by the special act. **Connor et al. v. State of Alabama on Information of Albert Boutwell, et al.**, 275 Ala. 230, 153 So. 2d 787.

Title 17, Section 103(1), and Section 1053(3), Appendix to the Code of Alabama Recompiled 1958, are general laws dealing with elections generally and should not be considered in connection with municipal elections. This for the reason that municipal elections are governed exclusively by the provisions of Act No. 663 and Act No. 664, *supra*.

Specifically answering your question as to compensation of election officials, your attention is directed to Section 7 of Act No. 663, wherein it is provided that each election officer at a polling place where elections are conducted in whole or in part by voting machines shall receive \$8.00 per day for his services.

The answer to your second question is also found in Section 7 of said act, wherein it is provided in those municipalities where voting machines are used, an inspector, chief clerk, and first and second assistant clerk shall be appointed for each voting machine.

It, therefore, follows in the example given by you, if two voting machines are used in one voting place, eight election officials must be appointed, namely, four for each machine. The provisions of Acts 663 and 664, *supra*, are applicable to all municipalities, except those having 300,000 population or more, unless a local act applicable to a particular municipality intervenes.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

July 14, 1964

Honorable B. R. Winstead, Jr.
Director of Finance
205 City Hall
Birmingham, Alabama

Insurance—Municipalities.

A municipality is authorized to reimburse its employees for the purchase of liability insurance coverage which protects such employees while driving municipal vehicles or other vehicles used in the business of the municipality.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated June 19, 1964, reads as follows:

"Enclosed is a certified copy of a resolution which was adopted by the Council of the City of Birmingham on June 16, 1964 and a copy of Ordinance No. 64-39. The ordinance will require the undersigned, as Director of Finance of the City of Birmingham, to reimburse employees of the city from city funds for the cost of certain personal liability insurance coverage, not to exceed Fifteen Dollars (\$15.00) per annum for each employee.

"The undersigned, being an officer of the City of Birmingham required to collect, disburse, handle and account for public funds of said city, respectfully requests an opinion in writing as to whether or not he may lawfully disburse public funds for the purpose and as required by Ordinance No. 64-39."

Proposed Ordinance No. 64-39, which is before the City Council of the City of Birmingham for passage, reads as follows:

"BE IT ORDAINED BY THE COUNCIL OF THE CITY OF BIRMINGHAM AS FOLLOWS:

"Section 1. Any present or future employee of the City of Birmingham who desires property damage and personal injury liability insurance coverage for himself while driving a city owned motor vehicle or other vehicle owned or possessed by him in and about the business of the said City may provide for himself such insurance coverage and be entitled to receive from said city the actual cost thereof not to exceed fifteen dollars per annum.

"Section 2. The Director of Finance is hereby authorized to make payments and reimbursements as authorized in Section 1 hereof and to promulgate reasonable rules and regulations relative to the making of such payments and refunds.

"Section 3. No employee is required to provide himself with the insurance coverage referred to in Section 1 hereof but only those employees who do make such provisions shall be entitled to the payments and reimbursements provided for in this ordinance.

"Section 4. It is not the intention of the City of Birmingham to purchase or provide liability insurance for its employees, but only to aid as herein provided such employee as desired the coverage referred to herein in his acquisition of such coverage, whether it be as a rider attached to his own insurance contract or an original contract purchased by him on a vehicle owned and operated by him in the performance of his duties for the city. The City of Birmingham shall not be a named insured in any such rider or contract.

"Section 5. Nothing in this ordinance shall in any way preclude or prevent the City of Birmingham in any case from claiming immunity from liability because of governmental function or otherwise.

"Section 6. This ordinance shall become and be effective on and after September 1, 1964."

An opinion reported in Quarterly Report of Attorney General, Vol. 86, page 7, held that a municipality may expend public funds to purchase automobile liability insurance which protects its employees from claims and suits of third parties arising from the operation and use of motor vehicles owned by the municipality.

Said opinion reads in part as follows:

"In **Nohl v. Board of Education of the City of Albuquerque**, 199 Pac. 373, 16 A. L. R. 1085, the school board had statutory authority to defray all expenses connected with the proper conduct of the public schools in their respective district. Under such authority, it was held that group insurance could legally be procured for school teachers and employees, it being shown that such was conducive to the proper conduct of the school by enabling the county board of education to procure and retain a better class of teachers.

"To like effect is **State, ex rel. Thompson v. City of Memphis**, 251 S. W. 46, where the court said: 'Ordinarily what can be done indirectly can be done directly. If a city can increase the wages of its employees, why not invest the increase in insurance for them instead of paying it to them direct, if, by so doing, they are better satisfied and the city obtains better service.' See also **Bowers v. City of Albuquerque**, 200 Pac. 421, and **Opinion of the Justices**, 249 Ala. 88, 30 So. 2d 14."

I am of the opinion that the problem presented by your request is controlled by the opinion reported in Quarterly Report of Attorney General, Vol. 86, page 7, *supra*, and the authorities there cited.

Therefore, you are advised that Ordinance No. 64-39, *supra*, when enacted will authorize you to disburse public funds of the City of Birmingham as directed by said Ordinance.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

July 21, 1964

Hon. Paul J. Hooton
Hooton & Hooton
Attorneys at Law
P. O. Box 129
Roanoke, Alabama

Hospitals — Randolph County.

1. Under the broad powers given to a county hospital

association by Act No. 211, General Acts of Alabama 1945, page 330, as amended, it may hire a director to run one of its units and pay him a salary; but it may not furnish him the use of a dwelling house owned by the association without rental charge; though his salary may be increased to take care of the rental cost.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of July 8, 1964 is as follows:

"The writer is Attorney for the Randolph County Hospital Association: The Association has a Hospital at Roanoke, Alabama, one at Wedowee, Alabama, and a Clinic with house at Wadley, Alabama, and likewise at Woodland, Alabama:

"At the moment and for some couple of years or less just past, Wadley has not had a Doctor located there, and this particular question is about and concerning the Clinic at Wadley, Alabama; it might be stated that the Clinic is well equipped and with pretty modern equipment, and it is an excellent building, plenty commodious and ample:

"There is as stated a dwelling built on the Hospital or rather Clinic property, and the dwelling is the property of the Clinic.

"Wadley wants to get a Doctor located there, and this question has arisen:

"Can the Local Board of Trustees under the Weathers Act employ a Doctor to run said Clinic? And for compensation?

"Can the Local Board of Trustees furnish this dwelling on the premises as a part of the remuneration for the pay of the Doctor to operate and run the Clinic?

"Of course the fees of the Doctor would be his; however there would be a minimum charge payable to the Clinic for each person entering or having treatment or an examination, and for this the Doctor (person in charge) would be responsible to the Clinic:

"I personally have thought and said that the above would be OK, but the Board both locally and of the Randolph County Hospital Association wants to know if what I think is right; in other words they know that the Ruling of the Attorney General would be much more protection and better for them to go upon than my opinion, even though I am their local Counsel."

In an opinion written to Honorable Lewis H. Hamner, Jr. under date of November 15, 1956, it was stated:

"I am informed by the Secretary of State that the Randolph County Hospital Association was formed under the provisions of Act No. 211, General Acts of Alabama 1945, page 330 as amended. * * *

"Under said act, the association has the authority to provide for the construction, reconstruction, improvement, alteration, or repair of any hospital or any part thereof; to take over by purchase, lease or otherwise, any hospital; to lease or rent any land, building, structure or facility needed in the operation of the hospital; to purchase, obtain options upon, acquire by eminent domain, gift, grant, bequest, devise or otherwise, any property, real or personal, or interest therein from any person, firm, corporation, city, county or government; to sell, exchange, transfer, assign, or pledge any property, real or personal, or any interest therein to any person, firm, corporation, city, county or government; to own, hold, clear and improve property; to borrow money upon its bonds, notes, warrants, debentures, or other evidences of indebtedness and to secure the same by pledges of its revenues; to make contracts and other instruments necessary or convenient to the exercise of the powers of the association, and to do all things necessary to carry out the powers given in Act No. 211, supra.

"Amendments No. LXXII and LXXVI, Constitution of Alabama 1901, when considered together, authorize the use of the said four-mill tax referred to in your request for acquiring, by purchase, lease, or otherwise, constructing, operating, equipping, or maintaining county hospitals, or non-profit hospitals and public health facilities.

"As used in Amendment No. LXXVI, supra, the term 'public hospital facilities' as used includes public hospitals, public clinics, public health centers, nurses' homes and training facilities, and related public health facilities of any kind. This amendment further provides that the proceeds of the tax may be anticipated and 75% of the annual proceeds pledged to secure the payment of principal and interest on bonds, warrants, or certificates of indebtedness of the corporation.

"The preservation of the public health is one of the duties devolving upon the state, as a sovereign power. It is one of the most important objects sought to be secured by governmental laws. While the proceeds from the four-mill tax for hospital purposes cannot be diverted to purposes other than those authorized by said constitutional amendments, yet in my opinion those amendments and the applicable statutes should be liberally construed to carry out the manifest purpose of preserving the public health. Quarterly Reports of Attorney General, Vol. 60, page 32; Vol. 78, page 56; Vol. 79, page 26. **In re Opinion of the Justices**, 252 Ala. 194, 41 So. 2d 559; **Barbour County Hospital Association v. Hudson**, 256 Ala. 238, 54 So. 2d 489."

Under the broad powers outlined in this letter, I am of the opinion that the first question propounded in your letter should be answered in the affirmative.

"* * * this office has generally recognized the fact that the hospital must have board contractual powers in the employment of salaried employees so long as the provisions of such employment do not violate the provisions of the Constitution of Alabama.

* * * Quarterly Report of Attorney General, Vol. 110, pp. 87, 88. Your attention is also invited specifically to the provisions of Section 94 of the Constitution of Alabama 1901:

"* * * This section prohibits the use of public funds for any expenditure constituting gifts or the lending of aid and credit to private individuals." Quarterly Report of Attorney General, Vol. 110, pp. 87, 88.

The Alabama Supreme Court has stated:

"We have held that a local act levying a county tax for hospital purposes may be valid to that extent, * * * but * * * the revenue shall be used exclusively for the establishment, maintenance and operation of a public hospital. * * *" **Barbour County Hospital Association vs. Hudson, et al.**, 256 Ala. 238, 241, 54 So. 2d 489, 492.

In an earlier case the court stated:

"It has been pointed out that the evil to be remedied is the expenditure of public funds in aid of private individuals or corporations, regardless of the form which such expenditure may take, * * *" **Opinion of the Justices**, 254 Ala. 506, 510, 49 So. 2d 175, 178.

I am of the opinion that the Wadley Executive Committee, acting within its sound discretion, has the power to contract with a qualified person, even though he be a medical doctor, to be the administrator of the Wadley Clinic; and that it may pay him a salary, and in reaching a fair and just remuneration, may take into consideration the rental cost of the dwelling in question.

However, the answer to your second question is in the negative, as no authority exists for furnishing such free living quarters for the administrator.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

July 22, 1964

Honorable John M. Breckenridge
City Attorney
City of Birmingham
City Hall
Birmingham, Alabama

Municipalities — Officers and Offices.

1. The City Council of the City of Birmingham is authorized to create the position of Research Assistant to the Council.

2. The Mayor of the City of Birmingham will be authorized to appoint a Research Assistant to the Council upon the creation of such position.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated June 26, 1964, reads as follows:

"A written opinion is hereby requested for and on behalf of the City Council, the Mayor and the Director of Finance of the City of Birmingham as to whether or not the City Council is authorized under the Mayor-Council Act of 1955 (Acts 1955, Pages 1004-1039) to establish a position of 'Research Assistant to the Council' by Ordinance Number 64-41 and whether or not the Director of Finance may pay the salary of such Research Assistant should he be employed by the Council to fill the position established by said Ordinance.

Enclosed herewith is certified copy of resolution of the City Council with a copy of Ordinance 64-41 attached thereto.

"In this connection I would like to direct your attention to the following provisions of said Mayor-Council Act of 1955.

"Section 4.06(2) (Page 1019 of the 1955 Acts) provides that the Mayor shall appoint 'all officers and employees of the City' except as otherwise provided by the Act.

"Section 4.06(6) provides that the Mayor shall 'prepare and submit to the Council such reports as may be required of him.'

"Section 4.07 provides that there shall be such '... departments as may be established by ordinance, upon the recommendation of the Mayor.'

"Section 3.07 sets out the powers of the Council. Nowhere in this section is there any express mention of authority in the Council to appoint and maintain one or more Council employees answerable only to the Council.

"If the Council may appoint one employee such as contemplated by Ordinance 64-41, then it may appoint several such employees together with secretaries, typists, and others. In other words does the Mayor-Council Act of 1955 authorize the Council of the City of Birmingham to provide for a group of City employees not answerable to the Mayor but appointed by and answerable only to the Council?"

Proposed Ordinance No. 64-41, which is before the City Council of the City of Birmingham for passage, reads as follows:

"BE IT ORDAINED by the Council of the City of Birmingham as follows:

"Section 1. In order to effectuate the Council's power and responsibilities under the Mayor-Council Act of 1955 the power to inquire and investigate, there is hereby created and established in the service of the City of Birmingham the position of Research Assistant to the Council of the City of Birmingham.

"Section 2. The duties of the Research Assistant to the Council shall be under the direction of the Council and shall be: (1) be on call of the Council to attend Committee meetings and take or cause to be taken the minutes of such meetings; (2) supervise the preparation of minutes of Council Committees; (3) answer correspondence for members of the Council related to their office when he has been authorized to do so by the individual Councilmen; (4) gather information and prepare reports for Committee Chairmen; (5) keep Council members apprised of all important matters received by him for the Council from the public, the Mayor and Department Heads of the City; (6) perform such other related services as may be required of him by the Council."

The questions presented by your request are whether the City Council of the City of Birmingham is authorized to establish the position of Research Assistant to the Council and whether said Council may make an appointment to fill such position.

The governing body of the City of Birmingham was organized under and is controlled by the provisions of Act No. 452, Acts of Alabama 1955, page 1004. Quarterly Reports of Attorney General, Volume 111, page 80, and Volume 112, page 24.

Section 3.10 of Act No. 452, *supra*, provides that the City Council may create, change and abolish municipal offices other than the ones established by said Act.

Therefore, I am of the opinion that said City Council is authorized to create the position of Research Assistant to the Council by proposed Ordinance No. 64-41, *supra*.

Section 4.06 of Act No. 452, *supra*, authorizes the mayor to appoint and remove all municipal officers and employees with certain exceptions not here material.

Section 3.08 of Act No. 452, supra, provides that neither the Council nor any of its members shall direct or request the appointment of any person to, or his removal from, office or position by the mayor or take part in any manner in the appointment or removal of the officers and employees in the administrative service of the City.

Therefore, I am of the opinion that, in the event proposed Ordinance No. 64-41, supra, is enacted by the City Council, the Mayor of the City of Birmingham, and not said Council, will be authorized to make the appointment to fill the position of Research Assistant to the Council. Of course, the Director of Finance of said City will be authorized to pay the salary of such Research Assistant.

The employment of such Research Assistant shall be subject to the Civil Service System applicable to the City of Birmingham, which is controlled by Act No. 248, General Acts of Alabama 1945, page 376, as amended.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

July 29, 1964

Honorable John L. Moore
Judge of Probate
Mobile County Court House
Mobile, Alabama

Taxation — Filing Tax — Mortgages.

Where a mortgage covering certain indebtedness has been recorded and the mortgage privilege tax paid, and subsequently another mortgage is offered for record, amending the original mortgage to increase the amount of indebtedness but not extending or changing the maturity date, mortgage privilege tax should be collected only upon that part of the indebtedness which represents an increase over the amount incurred in the original mortgage.

Opinion by Assistant Attorney General Loeb.

Dear Judge Moore:

Your request for an official opinion bearing date of July 16, 1964 is as follows:

"A question has arisen in this office regarding the privilege or license tax imposed by the Code of Alabama upon the recordation of a real property mortgage. This office has taken the position that a modification increasing the amount of the mortgage would require re-collection of the tax on the full amount then owed before the modification instrument could be recorded. It is our thinking that the Attorney General has previously ruled that where there is an extension the tax required on the amount extended must be collected.

"Apparently the basis of the ruling is Section 619(f) of Title 51, of the Alabama Code which reads as follows:

"When the term for the payment of the indebtedness secured by any such mortgage, deed or trust, contract of conditional sale or other instrument in the nature of a mortgage, is extended or removed, and the extension or renewal contract is offered for record. The tax required in this section shall be paid on the amount of indebtedness so extended or renewed; and the same shall be governed in all respects by the provisions of this article.'

"The question arises out of the proposed recordation of an instrument amending an original mortgage to increase the amount secured but which does not also extend or renew the ultimate maturity. The original mortgage will have already been recorded.

"The present plan is to have a construction mortgage in the amount of \$6,500,000.00 with the permanent mortgage to be increased to \$7,500,000.00. The increase would take effect when the mortgage was assigned to the permanent mortgagee.

"Query: Is the tax to be paid on just the amount by which the mortgage indebtedness is increased, or is it required to be paid on the entire amount (including both the amount by which the indebtedness is increased as well as the amount prior to the increase)?"

In your request, you point out that the instrument now sought to be recorded increases the original indebtedness, but does not extend the maturity date for payment of this indebtedness. Such instrument, therefore, does not fall within the provisions of Section 619(f), as amended, Title 51, Code of Alabama 1940.

It is the opinion of this office that since the instrument in question does not change the time of maturity, but merely increases the amount of indebtedness, the tax would only be due on the new or increased indebtedness. This conclusion appears to be supported by the opinion contained in Quarterly Report of the Attorney General, Volume 23, page 214.

Yours very truly,
RICHMOND M. FLOWERS
Attorney General

July 30, 1964

Hon. Walter S. Houseal
Superintendent of Insurance
Department of Insurance
C A P I T O L

Banks — Banking — Insurance.

Debt cancellation contracts issued by National Banks constitute engaging in the business of insurance and are subject to regulation by the State Department of Insurance.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of June 25, 1964, is as follows:

"James J. Saxon, United States Comptroller of Currency, recently issued a ruling that National Banks may issue debt cancellation contracts, on loans made by the bank, within the scope of their banking business. According to Mr. Saxon, the issuance of these contracts is not subject to regulation by the State Insurance Department, nor is the bank, in this matter, governed by State insurance laws.

"Please advise if the issuance of such debt cancellation contracts by National Banks, in your opinion, constitutes engaging in the business of insurance, within the meaning of our state laws, and as such would they be subject to regulation by the Alabama Insurance Department?"

Title 28, Section 2, Code of Alabama 1940, defines contract of insurance as follows:

"A contract of insurance is an agreement, express or implied, by which one party, for a consideration, promises to pay money, or its equivalent, or to do some act of value to the assured, upon the destruction of injury of something in which the other party has an insurable interest."

A debt cancellation contract, for which a charge is made of the borrower and which provides for cancellation by a national bank upon the death of such borrower is clearly within the meaning of a contract of insurance as above defined. The selling of such a contract of insurance, as insurance or by the designation of "debt cancellation contract" is engaging in the insurance business.

The duties and authority of the Department of Insurance is set out in Title 28, Section 47(3), Code of Alabama 1940, as amended, in the following manner:

"§ 47(3). Duties and authority of department.—The department

shall administer the laws of this state which regulate or otherwise relate to insurance, the insurance business and insurance companies, associations, exchanges, societies and their agents and representatives doing business in the state, the administration of which is now charged upon the department of commerce and the director thereof, and the bureau of insurance, the bureau of rates of the department of commerce and the office of fire marshal; and its authority to perform such functions shall be exclusive."

The Comptroller of the Currency in his recent ruling held that the execution of debt cancellation contracts could be made pursuant to the incidental powers allowed National Banks pursuant to Paragraph 7 of 12 USC 24.

However, a reading of the above U. S. Code Section discloses that under its national banking associations may exercise "... all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter..." Also allowed is a limited and regulated dealing in securities. But there is no mention or inference that insurance is to be considered an incidental exercise of such National Bank's corporate powers.

This current ruling is in conflict with the letter dated February 18, 1963, from the Comptroller of The Currency wherein it was stated:

"Nothing in this letter is intended to permit a National Bank to hold itself out to the public or to operate as a general insurance agent unless the bank is located in a town, the population of which is under 5,000."

In **Marshall National Bank and Trust Company v. Corder**, 194 S. E. 734 (Va. 1938), the Court held that national banks located in places having no more than 5,000 inhabitants are authorized to act as an insurance agent or broker.

This restricted authorization to act as insurance agent or broker in such small places is merely for sake of convenience.

Attention is directed to Title 15, Section 1012, USCA, which provides:

"§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair,

or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: **Provided**, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the **business of insurance** to the extent that such business is not regulated by State law. Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448."

There is no provision of the National Banking Act relating to the business of insurance. Thus, it would appear that Alabama has the power to subject National Banks within its boundaries to State insurance regulations. Certainly the provisions of the McCarran Act shows that Congress intended that the continued State regulation of the insurance business is in the public interest.

Application of Alabama insurance laws to the debt cancellation contracts would in no way interfere with the purpose of the creation of national banks. There is no authority in the National Banking Act permitting National Banks to engage in such debt cancellation contracts. There is a prohibition against such acts in the McCarran Act.

Alabama recognizes that National Banks are instrumentalities of the Federal Government and makes no effort to regulate or supervise their **banking activities**. Title 5, Section 18, Code of Alabama 1940, provides:

"Examination of banks.—Every bank carrying on a banking business in the State other than national banks shall be subject to the supervision and inspection of the superintendent of banks and the regulations and supervision thereof . . ."

In my opinion, issuance of debt cancellation contracts by National Banks constitutes engaging in the business of insurance, within the purview of our State laws and, as such, is subject to regulation by the Alabama Department of Insurance.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

July 30, 1964

Hon. Walter S. Houseal
Superintendent of Insurance
Department of Insurance
C A P I T O L

Insurance — Gross Premium Tax.

Funds collected on life insurance policies providing additional benefits are premiums and are taxable as such.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of July 15, 1964, is as follows:

"I would like your opinion as to whether certain funds which are collected by certain life insurance companies doing business in Alabama should be considered premiums and, thus, taxable.

"The funds referred to are collected by these companies simultaneously with life insurance premiums, but are alleged by the companies to be special funds which are specified in the insurance contracts to be segregated from the life insurance portion of the contract, held in a special accumulation fund, and returnable to the insured under conditions set forth in the contract.

"In at least one instance, a company is handling these funds as a return of premium when the amount is refunded to the insured and deducting the amount returned from current premiums received.

"In order to establish uniformity among all companies in the handling of these funds, I would appreciate your opinion as to how this should be handled from a premium tax standpoint."

Title 28, Section 2, Code of Alabama 1940, defines a contract of insurance as follows:

"§ 2. Contract of insurance defined.—A contract of insurance is an agreement, expressed or implied, by which one party, for a consideration, promises to pay money, or its equivalent, or to do some act of value to the assured, upon the destruction or injury of something in which the other party has an insurable interest."

These are contracts of life insurance with certain additional benefits provided according to the tenor of each contract.

Article 12 of Title 51, Code of Alabama 1940, as amended, provides for the premium taxes to be paid by insurance companies.

Title 51, Section 812, Code of Alabama 1940, as amended, provides, in part, as follows:

"§ 812. Definitions. . . .

"(1) The term 'insurance company,' as used in this article, shall include fire, life, benefit, accident, indemnity, fidelity, surety, guaranty, employer's liability, casualty, plate glass, burglary, automobile, tornado, cyclone, mutual aid or industrial company or association, reciprocal exchanges, or fraternal benefit societies or associations, or any other insurance company or association or society charging a premium for contracts entered into by such companies, associations, or societies. Provided, however, the exemptions granted in Title 28, Chapter 9, Code of Alabama 1940 are applicable hereto and not included in this definition for societies or associations for which a license is not required to do business.

"(4) The term 'premiums,' as used in this article, shall include all amounts received in cash or otherwise on risks in this state as consideration for insurance contracts, less: (a) Insurance premiums returned, (b) reinsurance premiums from companies authorized to do business in Alabama and subject to the premium tax provided for in this article, and (c) dividends paid, applied, or left with the company to accumulate at interest."

In the instances set out in your request, the insurance companies sell contracts of insurance. For payment on such contracts premiums are paid.

In my opinion, the monies paid on such contracts are premiums within the meaning of Title 51, Section 812(4), supra.

The amount of premiums taxable thereunder would, of course, depend upon the contract itself. An all-inclusive rule establishing uniform premium taxing would be impossible in view of the different contracts.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

July 31, 1964

Honorable William F. Killough
Judge of Probate, Talladega County
Talladega, Alabama

Counties — Rights of Way — Easements — Vacation — Torts.

1. An easement right of way for a public road would not automatically revert to the original grantor by ceasing to use the same as such. Nonuser short of the time for prescription, twenty years, does not amount to an abandonment.

2. Vacation for public roads may be effectuated by the county governing body by compliance with the provisions of Title

56, Chapter 3, Sections 26 - 31, Code of Alabama 1940 or by circuit courts in equity in suits brought by abutting property owners. Until formal vacation county liable for maintenance.

3. Access roads to lake considered a public use of said roads the same as any other public roads.

4. County not liable in tort for negligence of officers, employees, or agents. Liability for damages would depend upon question of fact in each individual instance.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of July 21, 1964 is as follows:

"In connection with the construction of the Alabama Power Company dam and lake in Talladega County certain paved roads of the county were inundated and the power company compensated the county for the damages and cost of changes in the roads up to a certain contour line.

"Now there are dead end paved roads up to the lake or property of the Alabama Power Company which the county has deeds to such as the blank form which I have attached. It has been proposed that the county retain these roads with their rights of way for public access to the lake and for boat launching ramps.

"Our questions are:

"1. Please examine the blank form of 'Right of way Deed for Public Road' which we are enclosing. Do we have a deed to the right of way or do we have just an easement to use the land for a public road?

"2. Where the county ceased to use the right of way for a public road would it revert to the original owners automatically or would the original owner have to get a deed back from the county?

"3. Would the use by the public of these roads as access roads to the lake be considered their use as public roads under the deeds that we have?

"4. Would the county be liable to suits for damages in case of accidents in the launching of any boats or of drowning on such places?

"5. Could the Court of County Commissioners by resolution declare all portions of these roads, which are no longer used for thru travel, abandoned and thereby relieve the county of any obligation to maintain these roads?

"We are being pushed on these questions and would like to have your opinion as soon as possible."

In answer to your first inquiry, I am of the opinion that the blank form of "Right of Way Deed for Public Road," which you enclosed, conveyed merely an easement to use the land for a public road and not a fee.

In answer to your second inquiry, it is my opinion that the easement right of way for a public road would not automatically revert to the original grantor by the county ceasing to use the same as such. Nonuser of a public road short of the time for prescription, twenty years, does not amount to an abandonment thereof.—Quarterly Report of Attorney General, Volume 48, page 256. There must be a formal vacation of such rights of way, or parts thereof, in order for the county to legally execute deeds of same to individuals.

Your third inquiry should be answered in the affirmative. The use of the roads in question as access roads to the lake by the public would be considered "a use as public roads" under the deeds in question the same as other public roads of the county.

In answer to your fifth inquiry, the vacation of said roads, or parts thereto, may be effectuated by the county governing body by compliance with the provisions of Title 56, Chapter 3, Sections 26-31, Code of Alabama 1940. In addition, circuit courts in equity have the power to act in suits to vacate streets, roads, etc., when brought by any abutting property owners.—Quarterly Report of Attorney General, Volume 62, page 8; Letters to Mr. O. W. Taff, Chairman, Russell County Commission, dated August 15, 1962; Honorable Calvin Pool, County Attorney, Butler County, dated December 18, 1956; and Honorable W. D. Farrior, Chairman, Board of Revenue, Lowndes County, dated May 31, 1955. Until there is a formal vacation of the roads under consideration the county is obligated to maintain the same.

Reverting to your fourth inquiry, I wish to state that the liability of the county for damages would depend upon a question of fact arising in each particular instance. A county is not liable in tort for the negligent acts of officers, employees, or agents. Generally speaking, I do not think the county would be liable for damages in case of accidents in the launching of boats or of drowning on such places off the right of way. The county's liability in regard to the roads under consideration would be the same as any other roads of the county.—See Title 23, Section 57, Code of Alabama 1940 and annotations thereunder.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

August 7, 1964

Honorable George W. Long
Superintendent, Dale County Schools
Ozark, Alabama

Schools — County Boards of Education — City Boards of Education — Municipalities — Census.

1. A municipality having a population of 2500 or more inhabitants according to last or succeeding federal census, or certain special census, is a city within the meaning of Title 52, Section 148, Code of Alabama Recompiled 1958.

2. Such a city has authority to have its own city board of education, and the county board of education is required to deliver to city board the supervision, management, and control of the properties involved.

3. Title 52, Section 197 (1-30), 1963 Cumulative Pocket Part, Code of Alabama Recompiled 1958, deals with the creation of independent school districts and withdrawal of such districts from general school system, and is not applicable to newly created city boards of education.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of July 30, 1964, which is as follows:

"The School in the Town of Daleville has been at all times under the jurisdiction of the County Board of Education, in School District #1.

"I am informed that the town authorities have recently had a census taken under the provisions of Title 37, Sections 481-484, of the Code of Alabama, and, according to this census, this 'Town' is now a 'City' within the meaning of Title 52, Section 148, of the Code of Alabama, and, consequently, are legally entitled to have the Daleville School governed and controlled by a City Board of Education.

"I have been advised that, inasmuch as the Daleville School is within the territorial limits of School District #1, which School District is under the jurisdiction of the County Board of Education, then, before the authorities or governing body of the municipality of Daleville can take over the jurisdiction of the Daleville School and place it under the control of a City Board of Education, it would be necessary that the interested parties comply with the provisions of Title 52, Sections 197 (1-30) as shown in the Supplement to Code of 1940, this being Act of the Legislature 2nd Ex. Sess. P. 199, approved August 10, 1959.

"Please let me know the following:

"1. Is the Town of Daleville now a city within the meaning of Title 52, Section 148?

"2. If this community is now a city, what action will the County Board have to take to cede jurisdiction and turn over control of the Daleville Schools to the Daleville School Board?

"3. Will it be necessary for the local authorities of Daleville to comply with the 1959 Act of the Legislature, cited above, before the County Board can surrender control of the Daleville Schools?"

Your first question is answered in the affirmative by the specific provisions of Title 52, Section 148, Code of Alabama 1940, as amended by Act 1955, page 317 (Code of Alabama Recompiled 1958). Said section provides as follows:

"§ 148. **Definition of city.**—A city within the meaning of this title shall include all incorporated municipalities of twenty-five hundred or more inhabitants, according to the last or any succeeding federal census, or according to the last or any succeeding census taken under the provisions of sections 481 to 484, inclusive, of Title 37 of the Code of Alabama of 1940. (1927 School Code, § 188; 1955, p. 317, appvd. June 21, 1955)"

The 1955 amendment added all of the section following the words "federal census."

In answer to your second inquiry, it follows that the city in question has authority to have its own city board of education under Chapter 8 of Title 52 (Sections 148-176), Code of Alabama Recompiled 1958. In such event the county board of education is required to deliver to the city board of education the supervision, management, and control of the school properties involved.—**Shirey v. City Board of Education of Fort Payne**, 266 Ala. 185, 94 So. 2d 758. Cf. Quarterly Report of Attorney General, Volume 69, page 76. I am informed that the procedure of effectuating the transfer of appropriate school properties from a county board of education to a newly created city board of education is prescribed and provided for by the State Department of Education. It is suggested that you contact the said department in regard to matters concerning said transfer.

I am of the opinion that your third inquiry should be answered in the negative. Title 52, Section 197 (1-30), 1963 Cumulative Pocket Part, Code of Alabama Recompiled 1958, deals with the creation of certain independent school districts and the withdrawal of such from the general school system. It has no effect upon the creation of a city board of education and the transfer of appropriate school properties thereto under Chapter 8 of Title 52 (Sections 148-176), *supra*.

Yours very truly,
RICHMOND M. FLOWERS
Attorney General

August 18, 1964

Honorable Ira H. Weissinger
Judge of Probate
Lee County
Opelika, Alabama

Filing Tax — Mortgage — Taxation

Mortgage given to secure a debt already secured by a prior mortgage is exempt from the payment of mortgage filing tax under the provisions of Title 51, Section 619(d), Alabama Code 1940, provided the secured indebtedness remains unchanged in the amount and in the time of maturity.

Opinion by Assistant Attorney General Younger.

Dear Sir:

Your request for an official opinion bearing date of July 25, 1964, is as follows:

"A mortgage has been presented to me for filing in Lee County, Alabama, with the request that it be filed without payment of the privilege tax on mortgages. The facts relevant to the mortgage and the request for exemption from tax are as follows:

"1. The mortgage is one of two mortgages given to secure payment of a single indebtedness of \$63,000.00, each mortgage reciting the same indebtedness of \$63,000.00.

"2. The other mortgage given to secure this same indebtedness conveys property in Tallapoosa County, Alabama as security and that mortgage has been filed in Tallapoosa County and mortgage tax paid on \$63,000.00.

"3. The mortgage presented to me for filing in Lee County contains the following statement:

"This mortgage is to provide additional security for the indebtedness of mortgagors herein to mortgagee herein in the amount of \$63,000.00, which said indebtedness is secured by mortgage by mortgators herein to mortgagee herein, which has been filed for record in the office of the Judge of Probate of Tallapoosa County, Alabama and upon which the taxes provided by law have been paid."

"The mortgagee has given as the basis for his request for exemption of tax, Title 51, Section 619-D, which reads as follows:

"The privilege taxes required by law to be paid on mortgages, deeds of trust, and similar instruments shall not be required on or for the filing of any such instrument, providing additional or substantial security for any indebtedness secured by an instrument previously filed, upon the filing of which the taxes provided by

law have been paid or which was filed at a time when no such privileges taxes were required by law, provided the secured indebtedness remains unchanged in amount and in time of maturity.'

"The mortgagee further calls my attention to the provision of the above stated section to the effect that when mortgage tax on the full amount of the mortgage has been paid in one county, it may be recorded in another county without further payment of tax.

"I respectfully request that you give me your opinion as to whether I may accept the above described mortgage for filing without requiring payment of the privilege tax required on mortgages."

The question presented for answer is whether mortgage filing tax is due on a certain mortgage given as additional security when the prior mortgage has been previously filed in a different county and the mortgage tax in the full amount has been paid thereon. You cite the pertinent code section in your request, which is Title 51, Section 619(d), Alabama Code 1940.

Please note the requirements of the above cited code section. These are that the mortgage presented to you for filing, in order to be exempt from the mortgage filing tax, must be given as additional security for an indebtedness secured by an instrument previously filed upon which the mortgage filing tax has been previously paid and that the secured indebtedness remains the same in amount and in time of maturity. In the event the mortgage presented to you for filing meets the tests herein set out, upon sufficient proof thereof, it is my opinion that said mortgage would be exempt from mortgage filing tax. Quarterly Report of Attorney General, Vol. XXIII, page 214.

It is further my opinion that the above answer would be the same whether the prior mortgage had been filed and the filing tax paid thereon in your county or another county of the State of Alabama. You should, however, require the prior mortgage to be presented to you to prove the payment of the mortgage filing tax thereon and to assist in the proof concerning the indebtedness being the same and unchanged in amount and in time of maturity. You will probably need additional evidence on the latter point from the person responsible for the mortgage filing tax.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

August 19, 1964

Honorable W. W. Lazenby
Tax Assessor
Lee County Court House
Opelika, Alabama

Municipal Corporation — Ad Valorem Taxes

The Tax Assessor and Tax Collector of Lee County are required to account for City of Auburn taxes in gross of the total tax levied by the City of Auburn in accordance with Act 208, Local Acts, Regular Session, 1935, as amended by Act 491, Regular Session, 1951.

Opinion by Assistant Attorney General Burson.

Dear Sir:

Your request for an official opinion dated June 16, 1964 is as follows:

"Mrs. Bennett and I talked with Mr. Burson on Friday of last week about an opinion that had been rendered regarding the fee for collecting city of Auburn taxes.

"You are aware, I am sure, of the local act which allows 1% commission to the Assessors and Collectors for collecting ad valorem taxes for Auburn. Auburn has now added two new 5-mill school taxes, which they designate as 'Special School District Tax' and on which we have collected 2% commission since they are designated as 'Special Taxes.' It never occurred to us that their 'special' tax should be treated any differently from the County Special Taxes.

"There is also an additional tax which was original 'District No. 1 Special School Tax,' and this was a county-wide tax with only Opelika excluded. This was collected at 2%, and paid to the Custodian of the County School Funds. Since Auburn High School is now operated as a City School, their part of this original District 3 mill tax, is now designated 'Auburn 3 mill Tax' and is paid to the Custodian of Auburn School Funds, and we have collected a 2% commission on that as has always been done since we have been in office.

"These four 'break-downs' for Auburn entails quite a lot of time and expense, and it has been our feeling that the 'Special Taxes.' for Auburn would be treated as the other 'Special Taxes.' Will you please render an opinion as early as possible as we are ready to make the 1964 tax cards, and if we are not to be allowed 2% commission on the 'Special' taxes, then we prefer to show Auburn's tax rate as \$2.30 per \$100 value, and show only one line on all our assessments and reports.

"Question: Is it mandatory that we break it down?"

In addition to the information set out in the above request for

an opinion the following opinion is based upon information obtained in your office and in Mrs. Bennett's office in Opelika. It appears that all of your inquiry with the exception of the final express question, i.e., "is it mandatory that we break it down?" is covered by the opinion of the Attorney General of April 17, 1964 addressed to Mrs. Kenneth B. Roy, President, Auburn City Council, Auburn, Alabama.

The answer to your last question is in the negative. You are not required by Act 208, Local Acts, Regular Session, 1935, as amended by Act 491, Regular Session, 1951, to "keep a separate account of any special taxes collected for the City of Auburn." As was stated in Attorney General's opinion of April 17, 1964, *supra*, Act 208, *supra*, as amended by Act 491, *supra*, controls in regard to the collection of City of Auburn taxes. Sections 6-9, Act 208, *supra*, are the principal sections dealing with the duties of the Tax Assessor concerning City of Auburn taxes. Section 9 provides as follows:

"After the Municipal taxes have been levied by the Council, Board of Commissioners, or other governing body of the City of Auburn, and certified to the Tax Assessor of Lee County for the next succeeding tax year beginning on the 1st day of the next succeeding October, the County Tax Assessor must compute the amount thereof, at the rate levied by the City Council, Board of Commissioners, or other governing body of the City of Auburn as shown by the certified copy of the resolution or ordinance furnished the Assessor which will be owing by the tax payer to the City of Auburn on the assessed value of the property for the then current State tax year, and enter the same in the books of assessment required to be made by the said Assessor under the provisions of law, opposite the name of such tax payer, and foot up the same, the footings to be carried from page to page thereof, and the total amount thereof footed up, such books to approximately show that the assessed value as extended by the Assessor is for the Municipal taxes for the next succeeding tax year, based on the assessed value for State taxation for the then current tax year."

Sections 11-14 of Act 208, *supra*, are the principal sections concerning the duty of the Tax Collector in regard to accounting for the collection of the City of Auburn taxes. Section 14 provides as follows:

"The Tax Collector of Lee County shall not be required to make or keep a separate account of any special taxes collected for the City of Auburn, but shall keep such account only in gross of the total tax levied by said City. If any part of the tax collected by or for the City of Auburn is set apart by law for any special purpose, the Treasurer or Clerk of the City of Auburn shall as the law may direct keep a separate account and distinct fund as required by law from the amount paid to the Treasurer or Clerk of said City by the Tax Collector in proportion as such special tax levied bears to the total tax levied by the City of Auburn and the special taxes received by the Treasurer or Clerk of the City of Auburn shall be disbursed as required by law."

This section appears to be conclusive and makes the breakdown of taxes the responsibility of the Treasurer or Clerk of the City of Auburn. The responsibility of the Tax Assessor and Tax Collector appears to be satisfied by keeping accounts "in gross of the total tax levied by said City."

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

August 19, 1964

Honorable Phillip J. Hamm
Commissioner of Revenue
Administrative Building
Montgomery, Alabama

License Taxes—Tear Gas Bombs.

1. The so-called "Penguin" pen type tear gas gun and the detachable small cartridge, which device is used for the purpose of discharging tear gas, is not a tear gas bomb as is contemplated by Title 51, Section 600, Code of Alabama 1940, which levies a license tax on dealers in tear gas and other bombs, machine guns and sawed off guns.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of July 24, 1964, is as follows:

"The question has arisen as to whether the "Penguin" pen type gas gun which is made by Penguin Associates, Inc. of Malvern, Pennsylvania, is a tear gas bomb such as is contemplated under our license tax laws, and particularly under Section 600 of Title 51, Alabama Code 1940.

"The 'Penguin' pen type gas gun referred to is in the shape of and practically is of the same size as a fountain pen, and it resembles in some respects a fountain pen. Like a fountain pen it also has a clip which makes it suitable for being attached to the inside pocket. The device consists of a small cylinder or barrel which contains a thumb bolt which sets the gun in action. When ready for firing, a small cartridge containing a plunger and a chemical compound which is transformed into tear gas when the gun is fired by releasing the thumb bolt.

"The over-all dimensions of the above-mentioned device when ready for firing is approximately 4 7/8 inches in length. The receiver, which contains the thumb bolt action, measures approxi-

mately 4 inches. Instead of having a barrel and a separate tear gas cartridge, as many devices of this type have, a combination barrel and cartridge is provided. The special gas cartridge and barrel combination is about 1 1/4 inches long which is threaded at the primer end so that it can be screwed into the receiver for firing.

"Since the tear gas gun does not have a separate chambered barrel capable of firing a fixed round of ammunition, but is capable of firing only the special gas cartridges described above, it has been held by the United States Treasury Department not to be subject to the provisions of either the National or Federal Firearms Act.

"The gas cartridge which screws in and is attached to the cylinder when the gun is to be fired does not explode, and remains intact except for the fact that the chemical compound which is transformed into tear gas is fired and discharged therefrom when the cartridge comes into contact with the primer when the bolt is released.

"The 'Penguin' pen type gas gun is of very recent origin, and was very obviously not manufactured until several years after the enactment of the license tax statute now designated as Section 600 of Title 51, *supra*. Also attached to this letter is a brochure and other information describing and relating to this device.

"Section 600, *supra*, the license tax statute involved provides for a license as follows:

"Each person selling or dealing in tear gas bombs or other bombs, machine guns, or sawed-off guns, five hundred dollars.

Provided this section shall not be construed as legalizing the sale or rental of such articles.'

"Your official opinion is requested as to whether or not the so-called 'Penguin' pen type gun is a bomb, and particularly a tear gas bomb, as is contemplated by said license tax statute, so as to make the dealer subject to the provisions thereof.

"Your usual prompt attention to this matter will certainly be appreciated in view of the fact that an early decision by you is needed."

Your question is answered in the negative.

In my opinion the so-called "Penguin" pen type gas gun, or the small cylinder or cartridge containing the chemical compound which is attached thereto, is not a tear gas bomb or other type of bomb as is contemplated by Title 51, Section 600, Code of Alabama 1940.

The taxing statute does not define a tear gas bomb or any other type of bomb, nor does it include by name the "Penguin" pen type gas gun. Therefore, if the pen type gas gun is to be included it must meet the definition of a bomb, whether a tear gas bomb or other type of bomb.

A "bomb" is generally defined as a projectile containing a high explosive charge, which, when fired, usually explodes or disintegrates in its entirety. Words and Phrases, Permanent Edition, Volume 5, page 609, 1964-1965 Pocket Part, page 121; Webster's New International Dictionary, Second Edition, page 305. A "tear gas bomb" is also commonly considered to be a like device.

It does not appear that the "Penguin" pen type gas gun, which has been described by you in some detail, would fit the general conception or definition of a tear gas bomb or other type of bomb as is referred to in the license statute. Moreover, the rule is that where there is considerable doubt that a thing is covered by or included in a taxing statute, then such doubt is to be resolved in favor of the taxpayer. *Gottlieb v. City of Birmingham*, 243 Ala. 579, 11 So. 2d 363, *State v. Roden Coal Company*, 197 Ala. 407, 73 So. 5, and *Dixie Coaches v. Ramsden*, 238 Ala. 285, 190 So. 92.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

August 21, 1964

Honorable J. Paul Meeks
Judge of Probate
Jefferson County
Courthouse
Birmingham, Alabama

Elections — Government — Municipalities.

A petition to change the form of government of the City of Birmingham may be filed in the office of the Judge of Probate of Jefferson County, on or after August 24, 1964.

Opinion by Assistant Attorney General Gish.

Dear Judge Meeks:

Your request for an official opinion, dated August 10, 1964, is as follows:

"Under date of April 16, 1964 your office rendered an official opinion holding that no election for a change in the form of government in the City of Birmingham, Alabama could be held until the expiration of two years from the date of adoption of mayor-council form of government which was November 6, 1962, holding that your opinion was that an election to change the municipal form of government in said city may not be held on November 3, 1964.

"This office has had repeated requests inquiring if a petition calling for a new election to change the form of government of the City of Birmingham may be filed with the Probate Judge of this county prior to November 6, 1964, if the date of the election is subsequent to the date of November 6, 1964.

"Section 9.01 under Article IX of Act No. 452 of the 1955 Regular Session of the Legislature provides for abandonment of the mayor-council plan. No city may change from the mayor-council form of government within two years after the adoption thereof. **At the end** of such period, or at any time thereafter, the city may change its municipal form of government, either to:

"Section 9.02 provides that such change shall first be initiated by petition—in the same manner and subject to the same requirements as provided in Sections 1.02 to 1.05 of said Act.

"Section 9.03 provides that no election shall be held within two years after any other election thereof.

"Will you kindly give your opinion as to whether or not the Probate Judge of this county may receive such a petition prior to November 6, 1964, and if so, what would be the earliest date such petition may be received?"

As pointed out in the opinion of this office rendered to you under date of April 16, 1964, the mayor-council form of government prescribed by Act No. 452, Acts of Alabama 1955, page 1004, as amended by Act No. 1030, Acts of Alabama 1961, page 1616, was adopted on November 6, 1962, by the City of Birmingham. Said opinion held that said City may not abandon its present form of government within two years after the adoption thereof, or prior to November 6, 1964.

On or after November 6, 1964, said City will be authorized to change to one of the forms of government prescribed by Section 9.01 of Act No. 452, as amended, *supra*.

Section 9.02 of Act No. 452, as amended, *supra*, reads in part as follows:

"Such change shall, however, first be initiated by petition and submitted to a vote of the qualified electors at an election and shall receive at such election a majority of the votes 'yes' or in favor thereof in the same manner and subject to the same requirements as provided in Sections 1.02 to 1.05 of this Act except that the proposition on the ballot shall be changed to reflect the proposed form of municipal government to be submitted to the vote of the qualified electors . . ."

When a proper petition to adopt another form of municipal government, signed by at least ten percent (10%) of the qualified electors of the City of Birmingham, is filed in your office; you, as Judge of Probate of Jefferson County, must certify such fact to the Mayor of

said City within fifteen days after the receipt of such petition. The Mayor must, by proclamation, fix a date for holding a special election on the proposed change in the form of government of said City. The date fixed by the Mayor must not be less than forty nor more than sixty days after the Mayor receives your certificate. See Sections 1.02 and 1.03 of Act No. 452, as amended, *supra*.

Since an election to change the form of government of the City of Birmingham may not be held prior to November 6, 1964, since such election must be held not more than sixty days after the Mayor of said City receives your certificate, and since you must deliver said certificate to the Mayor within fifteen days from the receipt of a petition containing the required signatures, I am of the opinion that you will be authorized to receive such a petition on or after Monday, August 24, 1964. The seventy-fifth day prior to November 6, 1964, falls on Sunday, August 23, 1964, a day on which your office will be closed. Title 1, Section 12, Code of Alabama 1940.

If you receive such a petition on August 24, 1964, you must deliver your certificate to the Mayor of the City of Birmingham, on September 7, 1964, and said Mayor must set November 6, 1964, as the date of the election to change the form of government of said City.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

August 25, 1964

Hon. Albert J. Lingo
Director

Dept. of Public Safety
State of Alabama

Montgomery, Alabama 36102

Search Warrants—Highway Patrolmen — State
Dept. of Public Safety

1. The authority of Alabama Highway Patrolmen to
execute search warrants discussed generally.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion bearing date of August 17, 1964, is as follows:

"I would like an official opinion on the following question. Does the police power conferred on Highway Patrolmen (State Troop-

er) authorize him to execute search warrants as defined in Title 15, Section 100?

"Title 15, Section 100, states a search warrant is an order in writing in the name of the State, signed by a magistrate directed to the Sheriff or to any Constable of the County demanding him to search for personal property and bring it before the magistrate. The reports from the Attorney General 1919, 1920, Page 501, states officers of law enforcement department have no authority to execute search warrants as this authority is conferred to Sheriffs and Constables. However, Title 36, Section 58, Subsection 58, specifies the duty of the Director of the Department of Public Safety is to administer and enforce certain laws of Title 36. Title 36, Section 58, Subsection 60 states the Highway Patrol Officers have powers of peace officers and when duly appointed may exercise such powers anywhere within the State. Our question is, does this Section 58, Subsection 60 supercede Title 15, Section 100 and allow, or authorize members of the Highway Patrol to execute search warrants?"

The answer to your question is in the negative.

Title 15, Section 100, Code of Alabama 1940, as Recompiled 1958, provides:

"Definition of warrant.—A search warrant is an order in writing in the name of the state, signed by a magistrate, directed to the sheriff, or to any constable of the county, commanding him to search for personal property, and bring it before the magistrate."

In an opinion of this office under date of March 31, 1920, directed to the Honorable Thomas E. Kilby, Governor, found in Biennial Report of the Attorney General, 1919-1920, page 501, it was held that an identical Code section to the present Section 100, meant that **only** the sheriff and constable were directed to execute a search warrant; consequently, members of the Law Enforcement Department were not permitted to execute a search warrant since they were not specifically named in the statute.

I might point out that Section 100, *supra*, is a penal statute, and penal statutes are to be strictly construed. **Schenber v. State**, 90 So. 2d 234, 38 Ala. App. 573, cert. den. 90 So. 2d 238, 265 Ala. 700.

Refer also to Title 15, Section 105, Code of Alabama 1940, as Recompiled 1958, wherein the Code form of a search warrant is found, and it will be noted that the warrant is directed to the Sheriff or any constable.

In view of the above, it is my opinion that Alabama Highway Patrolmen (presently called State Troopers) are not permitted or allowed to execute search warrants under the provisions of Section 100, *supra*, except to accompany or aid one of the officers to whom the warrant is by law directed.

However, I would like to refer you to Title 29, Sec. 213, Code of Alabama 1940, as Recompiled 1958, which provides, in pertinent part, as follows:

"The warrant may be executed by any one of the officers to whom it is directed, but by no other person except in aid of the officer, he being present and acting in its execution, * * *

It was held in **Green v. State**, 38 Ala. App. 189, 79 So. 2d 555, that enforcement agents of the State ABC Board were lawful officers within the meaning of Section 213, supra, and could execute a search warrant for prohibited liquors.

Title 36, Section 58(60), Code of Alabama 1940, as Recompiled 1958, provides that duly commissioned Highway Patrolmen are peace officers with Statewide jurisdiction; consequently, it is my opinion that Highway Patrolmen are lawful officers within the meaning of Section 213, supra, and therefore could execute a search warrant for contraband liquors and beverages.

Title 14, Section 298, Code of Alabama 1940, as Recompiled 1958, provides, in pertinent part, as follows:

"* * * he shall issue his warrant directed to any lawful officer of the State of Alabama, commanding him to enter the house or room and to arrest all parties found therein and to bring them before such magistrate to be dealt with according to law."

It is my opinion also that a Highway Patrolman could execute a search warrant issued pursuant to the provisions of Section 298, supra, inasmuch as he is a "lawful officer of the State of Alabama."

In the case of **Roberts v. State ex rel Cooper**, 253 Ala. 565, 46 So. 2d 5, members of the Alabama Highway Patrol executed a search warrant directing them to seize gambling paraphernalia, and the court held that they had the authority to execute such a warrant. The Supreme Court opined that when designated "peace officers" by the Governor pursuant to the authority vested in him by Title 36, Section 71, Code of Alabama 1940, as Recompiled 1958, they were such "lawful officers of the State of Alabama" as could execute a search warrant for prohibited gambling devices.

I do not believe the **Roberts case**, supra, could be construed as granting authority and power to Highway Patrolmen to execute search warrants as authorized and provided in Section 100, supra, because Section 100, supra, placed the power to execute the search warrant in the hands of two categories of law enforcement officers, i.e. sheriffs and constables. Whereas Section 298, supra, empowers "any lawful officer of the State of Alabama" to execute a search warrant for prohibited gaming equipment.

Clearly, in view of Section 58(60), supra, an Alabama Highway Patrolman is a "lawful officer of the State of Alabama," but he is not a "sheriff" nor is he a "constable" as envisioned by Section 100, supra.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

August 27, 1964

Mrs. Billie K. Jehle, Executive Secretary
Alabama Board of Cosmetology
500 Dexter Avenue
Montgomery, Alabama

Cosmetology — Schools — Licenses — Registration —
Rules and Regulations — Statutes — Title 46, Secs. 64(38)
— 64(70), Code of Alabama 1940, Recompiled 1958, as
amended.

Authority of Board of Cosmetology to adopt Rules
and Regulations limiting the number of Schools of Cos-
metology in a given area considered generally.

Opinion by Assistant Attorney General Hall.

Dear Mrs. Jehle:

I have your letter of August 5, 1964, which is as follows:

"As you know, the practice of cosmetology in counties having a population of less than 600,000 in this State is governed by Act No. 78, Special Session 1961, Title 46, Chapter 33, Sections 64(38) - 64(70), Code of Alabama, 1940, as amended, and rules and regulations promulgated by the State Board of Cosmetology created thereby.

"This Act makes certain provisions for the registration, licensing and regulation of schools of cosmetology.

"It has come to the attention of the Board of Cosmetology that in certain areas of the State there are, or soon will be, a sufficient number of schools of cosmetology to accomodate such population areas, and the Board is concerned with the fact that if some limit is not Provided on the number of such schools which are allowed to register and be licensed in these areas, the competition among the schools may result in lowering their standards and financial difficulties for some or all of them.

"Therefore, the Board has requested me to ask your opinion as to whether or not the Board of Cosmetology has the power and authority to adopt rules and regulations limiting the number of

schools of cosmetology which may be registered and licensed on area population basis.”

It is my understanding from conversations with you and members of the Board of Cosmetology, that the standards which the board has been attempting to maintain as to the quality of instruction given in schools of cosmetology is in serious danger of being brought to a low ebb unless the Board is empowered to adopt reasonable rules and regulations to limit the number of such schools to be registered and licensed under Act No. 78, Special Session 1961, effective January 1, 1962 [T. 46, secs. 64(38-64(70), Code of Alabama 1940, Recompiled 1958, as amended] in various population areas subject to the Act.

Section 4 of the Act [T. 46, sec. 64(41)] provides in part as follows: “. . . The Board may from time to time promulgate necessary rules and regulations compatible with the provisions of this chapter . . .”

Pursuant to that provision, it is my understanding that the Board did adopt and publish a set of Rules and Regulations effective October 1, 1963, dealing with numerous phases of the occupations covered by the Act, including Rules and Regulations governing the establishment and operation of schools of cosmetology in the State of Alabama, such particular Rules and Regulations being contained in your published pamphlet on pages 8 through 16 thereof.

Section 10 of the Act [T. 46, sec. 64(47)], provides as follows:

“Registration of beauty shops and schools of cosmetology; apprentices.—(a) It shall be necessary for any person, firm, corporation or association to apply to the board for a certificate of registration as a registered beauty shop or school of cosmetology, within the meaning of this chapter, said application to be upon a form prescribed by the board, and shall be accompanied by the payment of the original registration fee, as hereinafter provided for. Any beauty shop or school of cosmetology shall after the effective date of this chapter fully comply with all the provisions of this chapter applicable thereto, and with all the rules and regulations promulgated by the board as hereinafter provided.

“(b) No beauty shop shall accept an apprentice unless such beauty shop be in charge of a managing cosmetologist licensed as such. Provided, further, that such shop may register one additional apprentice for each three additional licensed cosmetologists attached to its staff. In addition, such shop shall possess the necessary apparatus and equipment for the proper instruction in all subjects for the practices for which a license is required under this chapter, and shall maintain a daily record of the attendance of such apprentice or apprentices, together with the number of hours of apprenticeship, and shall certify to the board upon termination of such apprenticeship, the credits earned. Such instruction shall require the necessary training for a complete course comprising all

or the majority of the practices of cosmetology as provided in section 64(46), paragraphs (a) and (b) of this chapter and such course shall include practical demonstrations and theoretical studies and studies in sanitation, sterilization, and other safety measures, and the use of antiseptics, cosmetics and electrical appliances, consistent with the practical and theoretical requirements as applicable to cosmetology, as provided for in this chapter.

"(c) Any person, firm or corporation teaching any or all of the practices of cosmetology, shall be required to comply with all provisions applicable to schools of cosmetology or to beauty shops having apprentices and any and all rules which may be promulgated by the board. No school of cosmetology or beauty shop shall operate within this state unless a proper certificate of registration under this chapter has first been obtained. The practice of cosmetology shall not be followed in this state except in a duly registered beauty shop or school of cosmetology except for educational purposes."

Section 11 of the Act [T. 46, sec. 64(48)], provides as follows:

"Qualifications for registration of school of cosmetology. — No school of cosmetology shall be granted a certificate of registration unless it shall employ and maintain a sufficient number of competent instructors, at least one for every twenty students in attendance at any one time; shall possess apparatus and equipment sufficient for the proper and full teaching of all subjects of its curriculum; shall keep a daily record of the attendance of each student; maintain regular class and instruction hours, establish grades, and hold examinations before issuance of diplomas; and shall require a school term of training for a complete course comprising all or the majority of the practices of cosmetology as provided in section 64(45) (a) of this chapter, together with the minimum number of hours therein prescribed; and shall include practical demonstrations and theoretical studies and study in sanitation, sterilization, other safety measures, and the use of antiseptics, cosmetics and electrical appliances, consistent with the practical and theoretical requirements as applicable to cosmetology or any practice thereof, as provided in this chapter. Any such school that shall enroll student instructors, shall not have at any one time more than one student instructor for each licensed instructor actively engaged in such school."

Section 16 of the Act [T. 46, sec. 64(53)], sets up a schedule of fees to be paid by applicants for original registration, original licenses, annual renewals, temporary permits, licenses issued upon reciprocity, and examinations required under the Act.

Section 26 of the Act [T. 46, sec. 64(64)], provides in part as follows:

"... this chapter shall not apply to the teaching or practice of cosmetology in training public school or trade school pupils ..."

With all of the above in mind, we are brought down to the consideration of the problem posed by your letter.

A regulatory body such as the Board of Cosmetology, being a creature of legislative enactment, is governed by certain rules and decisions with respect to statutory construction in determining questions as to extent to which it may go in adopting rules and regulations within the scope of the legislation creating such a body.

Therefore, it appears that an examination of such authorities is in order as a preface to answering your question.

The law is that although the administrative officers and boards may lawfully be vested with a large measure of discretion in exercising their powers, this discretion must be exercised in accordance with established principles of justice and not arbitrarily or capriciously, fraudulently, or without factual basis. A regulatory body may not sacrifice one part of a class under its control in behalf of another. 42 Am. Jur., Public Administrative Law, Sections 69 and 70, pages 380 and 381. Accordingly, the general rule is that arbitrary power to grant or withhold licenses cannot be conferred upon a board or official. 33 Am. Jur., Licenses, Section 60, page 377.

There is no question but that the regulation of cosmetology schools is within the general scope of the police power of the state. Such a school may be required to obtain a license as a condition to be able to operate, and the state or its authorized agency may authorize the course of study and the number of teachers therein. But unless attempted regulation of a beauty school has some reasonable relation to public health, welfare, or safety, it will be declared invalid. 10 Am. Jur. 2d, Barbers and Cosmetologists, Section 4, page 818; 56 ALR 2d 898, et seq. It was held by one federal court that a provision giving the director of licenses the right to withhold a permit from a school, or revoke one already granted when in his judgment the school or college was not financially able to carry out any contract for instruction, was an improper delegation of power. *Marks v. Maybury* (D.C. Wash.), 36 F. 2d 397, Appeal dismissed 284 U.S. 691, 76 L.Ed. 583, 52 S. Ct. 5. Likewise, in *Robbins v. Webb's Cut-rate Drug Co.*, 153 Fla. 822, 16 So.2d 121, it was held that regulations that rest on nothing more than caprice of an administrative board cannot be enforced.

In the Alabama case of *State ex rel. Dally v. Woodall, et al.*, 225 Ala. 178, 142 So. 838, it was held that the right to follow lawful employment of any ordinary and harmless calling, and that of entering the professions duly and reasonably regulated under the police power, are of constitutional guaranty that may not be abridged, and are property rights that may not be arbitrarily denied without due process of law, and as to which the equal protection of the law may not be denied or withheld. This case further held that the State's regulation of an occupation which may become dangerous if unregulated must be uniform and that a board of cosmetological examiners was not

vested with arbitrary power to grant licenses to some and to refuse or to revoke licenses to others similarly situated. Therefore, in my opinion, the Alabama Board of Cosmetology does not have the power to adopt rules and regulations limiting the number of schools of cosmetology in certain population areas if such schools are otherwise qualified to register and be licensed in these areas.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

August 31, 1964

Hon. William F. Killough
Judge of Probate
Talladega County
Talladega, Alabama

Counties — Parks — Recreation Areas.

1. A county may legally purchase or lease land for the purpose of constructing and maintaining parks for recreational purposes thereon.
2. The county may make such improvements and construct such facilities on said land as suitable for public purposes.
3. A county may legally use convict labor in the construction and maintenance of such parks.
4. As a general rule, a county is not liable for the negligence of its employees. However the question of liability is governed by the circumstances and facts in each case.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of July 21, 1964, is as follows:

"We have a problem we would like your opinion on.

"As you may know the lake back of Logan Martin dam will very soon be filled. It has been proposed that the county purchase or lease small tracts of land on the shores of the lake at feasible places and construct on them small parks with boat launching ramps for the use of the general public.

"Our questions are.

"Can the County legally purchase or lease land for this purpose?

"Can the county legally construct boat launching ramps on such lands, either with the use of the county road crews or by contract paid for from the general fund of the county?

"Can we legally use our convict labor in the construction and maintenance of such places if otherwise proper?

"Should we construct such parks and ramps would the county be liable, under any circumstances, should an accident occur in such parks or in the launching of any boat.

"Our people are pushing us on this thing and we will appreciate your consideration as soon as you can."

My answer to your first question is in the affirmative.

Your attention is directed to Chapter 18, Title 12, Sections 224-226, Code of Alabama 1940. These sections read as follows:

"§ 224. Acquisition of lands.—Each of the several counties within the state and the governing bodies thereof, are authorized with the approval of the governor, but not compelled to acquire lands by donation or purchase, one or both, and make improvements thereon for county, state, national, and public purposes.

"§ 225. Use of lands.—Such lands may be used, among other things, for the following public purposes: For the recreation, health, and betterment, of the people within the county; for the betterment and improvement of all useful and ornamental vegetable life; including agriculture, arborculture, horticulture, and experimenting with growth and seeds of ornamental shrubs, trees, and flowers; for the betterment of all animal life including domestic animals, wild life, fish, and fish hatchery; including the collection and exhibit of minerals and all native products; including the creation and maintenance of springs, streams, and lakes thereon; including other improvements thereon such as fair grounds, athletic fields, museums, art galleries, military grounds, state armory, hospitals, school buildings; and such other improvements and buildings thereon as may be deemed necessary for public purposes.

"§226. Board of trustees.—The county governing body is authorized with the approval of the governor, to appoint a board of three trustees for the acquisition and maintenance of said lands and property; that said trustees shall be graduates of some high school or some reputable college, shall be men or women of public spirit, of means, and shall serve without compensation; that their terms and successors shall be fixed and determined by the governing body of the county with the approval of the governor; that a trust fund may be created by public donations or otherwise for the acquisition and maintenance of such property and lands; that it shall be lawful for the county, state, and national government

to contribute to the acquisition and maintenance of said lands and property. That the governing body of the county is authorized hereunder to make such contracts as may be deemed necessary."

You are advised that under the authority of the above sections, when authorized by the governor a county may expend public funds for the purpose of constructing parks for the recreation, health and betterment of the people of the county. However, if the county does not desire to follow this method of constructing parks here considered, it may do so through the county recreation board authorized by Title 12, Section 274-279, Code of Alabama 1940.

My answer to your second and third questions is in the affirmative.

The purpose of constructing the park herein considered is for the recreation of the general public of Talladega County. Certain it is the construction of boat launching ramps in such parks will enhance the recreation facilities thereof and make the area better suited for the use of the general public as a lakeside park.

The county either may construct these parks with county road crews provided such crews are not presently needed for the construction, maintenance and repair of the county public roads. I know of no legal injunction against the county using its convict labor on the construction and maintenance of such parks as recreation areas. The county may, if it determines, contract for the construction and maintenance of these facilities.

Your next question does not admit of a definite answer. As a general rule, a county is not liable for the negligence of its employees when they are engaged in a governmental function. However, the question of liability of the county should an accident occur in such parks will rest upon the facts and circumstances surrounding each individual case.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

September 2, 1964

Honorable H. Harrison Hill
Circuit Clerk
Eighth Judicial Circuit
Decatur, Alabama

Clerks of Circuit Courts — Clerks of Inferior Courts —
Comptroller — Costs and Fees.

1. Flat fees for Circuit Clerks and Ex-Officio Clerks under provisions of Act No. 740, Acts of Alabama 1957, page 1169; Act No. 543, Acts of Alabama 1957, page 764; Act.

No. 741, Acts of Alabama 1957, page 1170, and Act No. 542, Acts of Alabama 1957, page 762, accrue to the officer performing the particular service enumerated in the act for which the fee attaches and all other remaining duties are performed ex-officio without compensation.

2. General discussion of acts enumerated establishing fee schedules of Circuit Clerks and Ex-Officio Clerks of Inferior Courts for benefit of clerks going out of office January 1965.

Opinion by Assistant Attorney General Webb.

Dear Mr. Hill:

I have received your letter of August 10, 1964 in which you request an official opinion of this office as follows:

"Since I, as well as a few of the other Clerks, had the misfortune of not being re-elected for another term beginning in January, 1965, (incidentally I was the top man in the first primary but was low man in the second primary, the number of voters not being up to par and a miscalculation on the part of a few people who otherwise would have voted) there is a question which should be ruled on for the benefit of this office as well as the other Clerks' offices which are still on a fee basis instead of a salary.

"During the Session of the Legislature of Alabama 1957 there were various and sundry Acts passed changing the Clerks and Registers to what is commonly called 'Flat Fee System,' that is, each case docketed is charged a certain fee according to the nature of the amount of the suit involved as shown on the attached copies of Fees. The said Acts, in part, amended Title 11, Section 21 (Civil Cases); Title 11, Section 89 (Criminal Cases); together with Title 45, Section 69, governing the amounts the State of Alabama is allowed to pay on said 'Flat Fee System.' This also applies to Clerks of Circuit Courts who are Ex-Officio Clerks of County Courts as shown in Title 11, Section 89 (2) effective with terms thereof beginning in January, 1959.

"The question has arisen and is hereby propounded as to whether or not the fees in cases that are on the docket at the end of the outgoing Clerk's term, when they are collected by the incoming Clerk, should go to the outgoing or Ex-Clerk as the case may be, or would the incoming Clerk get a claim on the fees or a part thereof? I cannot conceive of the incoming Clerk claiming any part of the fees since the same cannot be divided and it would be just as fair for the incoming Clerk to look to his successor to collect his fees where his term is out. Under the old system of fees it could be divided as they were based on so much for docketing, so much for entering appearances, etc., but in the current fees it is so much for each case, therefore cannot be separated as could

be the old fees, except, of course, if an appeal were taken during the incoming Clerk's term he would be entitled to appeal cost.

"Your immediate attention to the above question would be appreciated in order that the incoming Clerks will be governed accordingly."

Flat fees for officeholders are not particularly new in the State of Alabama. Tax Assessors, for example, are on a flat fee basis for assessment of properties. While it is true that the fee takes into consideration a multitude of work to be performed, the fee itself normally attaches for the performance of a single act and the remaining duties are performed ex-officio without further compensation.

In the case of **Stewart v. Sample**, 168 Ala. 270, 53 So. 182, the Supreme Court of Alabama held:

"The evident intention of the last-cited section (Sec. 2097, Code of 1907; now absorbed, as modified in Sec. 30, Title 51, Alabama Code of 1940, as Recompiled) is that, as to state taxes, when the assessor has made the assessment nothing remains for him to do, and he has earned his commissions. The same is true as to any fees which he has earned."

I note in the instance of each act referred to by you there is a particular duty to be performed by the clerk which determines his fees and at that time the fee attaches to the clerk holding office performing the service. Act No. 740, Acts of Alabama 1957, page 1169 (Title 11, Section 21, Code of Alabama Recompiled 1958), is essentially a filing fee statute for civil cases and no further work or duties are contemplated by the wording of the statute for the clerk to earn his fees. Also noted are other specific duties for which the clerk receives a definite fee, such as furnishing a certified copy of a complete record, making records for appellate courts, taking bond, and collecting money in judgments. In two instances, however, the statute requires the doing of more than one act, and in these instances each specified duty must be performed for the fee to attach. They are:

"... for **filing, indexing and recording** the minutes of the court all executions issued by the State of Alabama . . ."

and

"... for **checking and including** transcript of testimony in record on appeal . . ." (Emphasis Supplied.)

Act No. 543, Acts of Alabama 1957, page 764 (Title 11, Section 89, Code of Alabama Recompiled 1958), also provides a particular duty for which a fee shall attach in criminal cases; namely, the entering of a plea to a particular charge at the time of trial of a defendant. In this regard, I call your attention to Quarterly Report of Attorney General, Volume 103, page 11 (21), to the instance that there may be cases in which the plea and charge will change and the possibility of

a fee changing accordingly. In such instances, of course, the fee that has attached is the fee attaching to the plea entered to the charge at the time of trial and the official holding the position of Circuit Clerk at the time of the attaching of the fee would, of course, be entitled to the fee. Again, other certain duties, such as certifying appeals, conditional judgment on forfeitures, etc., are enumerated for which a particular fee attaches at the time noted in the statute. As for preparing and certifying appeals, the fee, of course, would not attach until the certification of the appeal has been performed. At that time the fee attaches to the officer performing the duty of preparation and certification, since both duties are enumerated as essential for the fee.

Act No. 741, Acts of Alabama 1957, page 1170 (Title 11, Section 89(2), Code of Alabama Recompiled 1958), is very similar to Section 89, *supra*, in that this section sets up the fees accruing to the Ex Officio Clerks of Inferior Courts in criminal cases. However, it deserves specific note in that instead of attaching for plea of "not guilty" the fee attaches for trial and further note the following instances:

"In all cases tried and appealed

to the Circuit Court 7.50

"In all forfeiture cases 7.50"

This office has previously ruled that the tried and appealed clause of this section is a limit on fees to be collected for the clerk for all cases that are tried and appealed and is not a fee for an act in itself. Quarterly Report of Attorney General, Volume 103, page 11(14). As to the forfeiture cases, when the "case" has been adjudicated and judgment is entered, the fee thereupon attaches to the clerk holding the office at that particular time. Quarterly Report of Attorney General, Volume 103, page 11(17).

Act No. 542, Acts of Alabama 1957, page 762 (Title 45, Section 69, Code of Alabama Recompiled 1958), is not a fee schedule for performance of duties, as such, but actually amounts to a limitation on amounts to be paid by the state. The fees set out attach at the times noted in Title 11, Section 89. The difference, if any exists, may be paid from the fine and forfeiture fund under those circumstances set out in the discussion in Quarterly Report of Attorney General, Volume 103, page 11 (22-23 discussion).

It is, thus, my judgment that when the particular duty described in the statutes mentioned above, is performed a fee attaches according to law and this fee accrues to the officer performing the particular service noted. **Stewart v. Sample**, 168 Ala. 270, 63 So. 182.

In many instances, fees will accrue to the clerk going out of office this coming January and duties will have to be performed by the incoming clerk ex-officio without compensation. This particularly will be the case as noted in those civil cases filed in the Circuit Court

prior to the expiration of the term of office and to those criminal cases in which a plea has been entered. In other instances, the fee will attach to the incoming clerk with many duties being performed ex-officio without compensation by the clerk going out of office. However such, in my opinion, was the intent of the statute in the designation of particular acts or circumstances for which a set flat fee would attach.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 3, 1964

Honorable Arnold D. Debrow
Tax Assessor
Mobile County Courthouse
Mobile, Alabama

Ad Valorem Taxes — Assessments

Act 934, Regular Session 1961, establishes the procedures and time limits for accomplishment of assessment and equalization of taxes in the counties within the purview of the Act, and these limits must be observed by county officers and/or administrators.

Opinion by Assistant Attorney General Burson.

Dear Sir:

Your request for an official opinion bearing date of July 30, 1964 is as follows:

"As you know, Mobile County is presently acting under Act #939, 1961 Session of the State Legislature, which is the general act of local application. This Act provided for a perpetual equalization program in tri-annual cycles, allowing four years from October 1st, 1961 for the first cycle and three years for each re-appraisal cycle thereafter.

"In regards to the execution and implementation of this law, certain questions have arisen in regards to which I am asking your official opinion. These questions are as follows:

"1. Does the Tax Assessor or the Board of Equalization have the

authority to hold up the enforcement or new appraisals provided for under this Act, or is it your opinion that an erroneous assessment, whether it be too low or too high, is required to be corrected at the earliest possible moment.'

The first part of your question, i.e. "Does the Tax Assessor or the Board of Equalization have the authority to hold up the enforcement of new appraisals provided for under this Act, . . .?", must be answered in the negative. It is my opinion that Act 934, Regular Session, 1961, codified as Sections 609(18) — 609(31), 1963 Cumulative Supplement to Volume Fourteen, is explicit in its directives to both the tax assessor and Board of equalization of counties coming within the population limits of the Act. The language of the statute does not contemplate nor allow for delay beyond those time limits specified in the Act.

Section 609(18) *supra*, places the prime responsibility and authority for assessing all real property and equalizing the assessments thereof on the tax assessor. The section provides as follows:

"The tax assessor of any county in this state having a population of not less than 300,000 nor more than 500,000 according to the last or any subsequent federal decennial census shall have the prime responsibility and authority as hereinafter provided for assessing all real property subject to ad valorem taxes within such county which are subject to assessment by him, within any such county and shall, also, have the prime responsibility and authority as hereinafter provided for equalizing the assessments against all such property."

The tax assessor is charged under Section 609(19), *supra*, with dividing the county into geographical districts. The phrase, "as soon as practicable after the provisions of this subdivision are effective in any county . . ." is used; however, the language of Section 609(22) *supra*, clearly requires that a survey and equalization of the real property in the county be completed by the end of the fourth year after the Act becomes effective in the county and that during every three year period, thereafter, all geographic subdivisions in the county will be surveyed and equalized. Thus, all procedures required to be established by Act 934, *supra*, in order to effectuate the provisions of the Act must be accomplished in an expeditious manner.

Section 609(22), *supra*, provides in part as follows:

"The tax assessor of any county coming under the provisions of this subdivision shall proceed immediately to appoint such appraisers as authorized by the governing body of such county to properly appraise, in conformance with appraisal procedures which shall be approved by the commissioner of revenue of the State of Alabama, all parcels of land, and the improvements thereon, located within such county which are subject to assessment by the tax assessor under the general laws of the state within a period not to exceed four years. Thereafter, he shall appoint such appraisers with the approval of the county governing body as are

necessary to provide for a program of continuous review of all property and property values within such county as may be necessary to maintain all properties subject to assessment by him at equal assessment proportionate to the appraised values of such properties such program of review to cover all properties in the county at least once during each successive three year period. The appraised value required herein to be determined for each parcel shall be multiplied by the percentage ratio certified to the tax assessor by the board of equalization as provided by section 609(27) of this subdivision to determine the assessed value of each parcel, provided, however, that should the appraised value of any parcel as determined by the tax assessor result in a lowered assessment, the tax assessor shall in the geographic listing of assessments, and all other assessment records of the tax assessor, clearly indicate by the use of a bold underscore, asterisk or other easily identifiable symbol that the assessed value for that particular parcel has been lowered, and provided further that such appraisal and assessment shall constitute merely a recommendation to the board of equalization, and that such appraisal and assessment shall in no way and at no time be the official assessment figure until so determined by the board of equalization as indicated by the initials of a member of the board immediately adjacent to such assessment figures. In the event the board of equalization does not approve any such recommended appraisal and/or assessment, the board shall enter on the geographical listing and all other assessment records of the tax assessor the appraisal and/or assessment which it determines to be proper in each such instance in the same manner as provided in section 609(27) of this subdivision for cases wherein the board of equalization sets aside or modifies appraisals and/or assessments of the tax assessor." [Emphasis supplied.]

Section 609(27), supra, places sole responsibility and authority for establishing a ratio percentage to be used for the first four year period and for each succeeding three year period in the valuation of the real property in the county on the Board of Equalization. The Tax Assessor must use this figure and the section likewise requires that the Board review the Tax Assessor's books from time to time to ascertain that the ratio is being applied to all property. The Board is authorized to change assessments and these changed assessments shall be valid until again changed as provided in the Act. Section 609(27) provides as follows:

"The board of equalization shall have the sole authority to determine the ratio percentage used by the tax assessor in establishing assessed values from appraised values. The board shall have the responsibility and authority for review of the records of assessments of the tax assessor to insure that such assessments have been made with equality and impartiality and that they have been determined in accordance with the ratio percentage determined by the board.

Immediately upon coming under the provisions of this subdivision the board of equalization in such county shall certify to the tax assessor the ratio percentage to be used by him during the first four years that this subdivision is in effect in such county. Thereafter the board shall establish and certify to the tax assessor at the beginning of each succeeding three year period the percentage ratio to be used during each such period. Once the percentage ratio has been established for any such appraisal period it shall not be changed during such period. Upon certification of the ratio percentage at the beginning of each three year appraisal period as herein required, when such ratio will require a simultaneous reassessment of all properties by the tax assessor, the board of equalization shall cause publication to be made once each week for a period of three weeks in a newspaper of general circulation within the county, or shall post for a period of three weeks at some conspicuous place in the courthouse of such county should there be no newspaper of general circulation within such county, a notice of such percentage ratio and such publication shall constitute notice to all taxpayers of the changed assessments resulting therefrom, which notice shall be in lieu of any other notice required by law to be given of changed assessments to such taxpayers. In all other instances where assessments are changed under the provisions of this subdivision notice thereof shall be given the taxpayer as required in such counties by the Code of Alabama of 1940 as amended. Upon receipt of the certification of the percentage ratio for any three year period from the board of equalization the tax assessor shall forthwith reassess all property according to the new percentage ratio, if it is different from the last previous percentage ratio, entering such changed assessments on his records during the assessment period wherein the new percentage ratio is received and such assessments shall remain in effect until further modified by the tax assessor or the board of equalization as provided by this subdivision. In any instance in which the board of equalization shall determine that the tax assessor has not properly or correctly appraised and/or assessed any parcel of property it shall set aside such appraisal and/or assessment and enter upon the tax assessor's books and records, in red ink, such appraisal and/or assessment as the board shall deem correct and proper. Such assessment entered by the board of equalization shall be and constitute the official assessment on such property and shall until changed as herein provided, be the assessment upon which all ad valorem taxes due on such property shall be paid. In its review of the records and books of the tax assessor the board of equalization shall, in addition to all other duties placed on it by law, annually at its regular meetings, inspect the geographic listing of all assessments maintained by the tax assessor in accordance with the provisions of this subdivision. The board of equalization shall insure that for each successive three year period, after the first four years that this subdivision has been in effect in any

county, the ratio of assessments to the appraised value is the same for all parcels in the county. Should there be parcels whose ratio of assessment to appraised value is not the same as the standard set by the board of equalization, the board shall immediately appraise such parcel or parcels, and based on such appraisal, make and declare assessments on such properties, which assessments so made and entered on the records of the tax assessor shall be and continue to be the official assessment of such properties. **During the first four years that this subdivision is in effect in any county in the state, the board of equalization of such county shall examine in great detail, the records of assessments of such tax assessor to ascertain whether or not he is proceeding expeditiously [expeditiously] to carry out the provisions of this subdivision and shall make public its findings. To accomplish the duties required of it in this section any such board of equalization shall appoint appraisers and other necessary personnel in accordance with the provisions of section 95, Title 51, Code of Alabama, 1940, as amended, or may with the approval of the governing body of the county retain the services of competent, recognized, and qualified independent professional appraisers, or an association of professional appraisers, to make such appraisal or reviews, to properly check all or any appraisals made by the tax assessor which, in the judgment of the board of equalization, are either questionable, incorrect, or are not compatible with other appraisals in the same district. In the event that the appraisals of the board of equalization are different from the appraisal of the tax assessor of any such county the board of equalization shall direct its secretary to correct, in red ink, the tax assessor's entry. After reviewing and/or correcting the tax assessor's geographic listing of assessments the chairman of the board of equalization shall enter the year and his initials on each page of the geographic listings of assessments."** [Emphasis supplied.]

A further limitation on the tax assessor is contained in Section 609(22), *supra*. The authority to lower an assessment is restricted. He cannot lower assessments by district or grouping and not more than 10% of the parcels in any district in any year can be lowered without the approval of the board of equalization. Section 609(22), *supra*, provides, in part, as follows:

"It is further provided that the tax assessor shall not be authorized to make any reductions in appraised values of properties by district or other grouping, but shall be required to support each lowered appraised value by a specific appraisal of the parcel concerned; and the lowering during any tax year of more than 10% by number of the parcels in any district shall constitute prima facie evidence of the violation of this prohibition by the tax assessor. In any instance where the tax assessor considers that the appraisal value of more than 10% by number of the parcels in any district should be lowered, he shall be required to make a written recom-

recommendation thereof to the board of equalization which may or may not give the assessor written authority to determine and recommend to the board appraisal values of such parcels in excess of the said 10% limitation, and if such authority be granted to the tax assessor by the board of equalization such appraisals and the assessments based thereon shall be handled in all manner the same as other lowered assessments. All appointments of appraisers as called for herein shall be made in strict conformity with the provisions of any existing civil service or merit law in such counties, and the tax assessor shall be deemed to be the appointing authority within the meaning of any civil service or merit law of such county."

Section 609(28), *supra*, is a further limitation on the tax assessor and on the board of equalization. It prevents either and/or both from altering, adjusting or changing "the total assessments in such county in any manner which might impair any outstanding obligations of such county, any political subdivision thereof, any school district, or any governmental agency for the payment of which the proceeds of any tax either in whole or in part, derived from, or affected by, the assessments of real property within such county have been pledged."

Thus, while the tax assessor and the board are limited by the provisions of the Act and any delay occasioned by the procedure established in the Act is necessary, delay beyond that required by the statute itself is not authorized. Certainly delay by either the tax assessor and/or the board of equalization which would prevent the effectuation of the provision of Act 934; i.e., the equalization of all property in the county within four years of the Act becoming effective in the county and the equalization in each succeeding three year period, is not authorized. It is reiterated therefore that the answer to the first part of your question must be in the negative.

The answer to the last part of your question; i.e., "... or is it your opinion that an erroneous assessment, whether it be too low or too high, is required to be corrected at the earliest possible moment"? has been given in the discussion preceding. An erroneous assessment should be corrected as soon as possible within the procedure established by Act 934, *supra*. The tax assessor and the board of equalization are charged with the duty of carrying out the provisions of the Act within the limitations set out in the Act.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

September 8, 1964

Hon. Ira H. Weissinger
Judge of Probate
Lee County
Opelika, Alabama

Elections — Congressmen — Voting Machines.

Under the provisions of Act No. 21, Special Session of the Legislature 1964, dividing the State into Congressional Districts, and providing that each district shall elect one Congressman, voting machines should be used in such elections in those counties in which voting machines are used.

Opinion by Assistant Attorney General McQueen.

Dear Judge Weissinger:

Your request for an official opinion, bearing date of September 3, 1964, is as follows:

“Re: Congressional Candidates

“Since talking with you on the telephone the other day, I have had several inquiries concerning your opinion that the congressional candidates’ names will appear on the voting machines. I would like very much to have your written, official opinion on this in order that I might show it to these people who have made the inquiries.”

Under the provisions of Act No. 21, Special Session of the Legislature 1964, which act amends Sections 425 and 426 of Title 17, Code of Alabama 1940, dividing the State of Alabama into eight congressional districts, and providing that each district shall elect one congressman in the November general election, and all subsequent elections, electing representatives of Congress, voting machines must be used in those counties which have adopted the use of voting machines.

Prior to the passage of Act No. 21, *supra*, congressmen were elected under the provisions of Act No. 154, Special Session of the Legislature 1961, commonly referred to as the “9-8” Bill. This act specifically provided that paper ballots be used in certain elections thereunder. It further provided for a state-wide election in which eight congressmen were chosen from the nine candidates and that eight persons should be voted for in this election. Due to the mechanical construction of the voting machines, it was impossible to fix the machines so that a person could not “single shot” in that election, that is, vote for less than eight candidates. Of necessity this office ruled that paper ballots would have to be used in the state-wide election held under the provisions of Act No. 154, *supra*.

The election of representatives of Congress will be held under the provisions of Act No. 21, Special Session of the Legislature 1964. Voting machines must be used in those counties in which the use of voting machines has been adopted, as the election provided for thereunder is no different from any election held in the State of Alabama.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

September 9, 1964

Hon. Sam Drinkard
Tax Assessor
Marengo County
Linden, Alabama

Tax Assessors — Commissions — Assessments

1. There is no provision in Title 51, Section 30, Code of Alabama 1940, or in any other section in the Code which would prohibit a Tax Assessor paid on a fee basis from making a valid assignment to a bank or other assignee, as between himself and the assignee, of the commissions lawfully due him for the tax year involved, and which become payable to him on October 1, at the end of the tax year out of the first money collected by the tax Assessor, as is provided in said code section, or which would prevent the Tax Assessor from making such an assignment at any time during the tax year after he has earned the commissions by completing his assessments and before they are paid to him by the Tax Collector on or after October 1.
2. Under the provisions of Title 51, Section 30, supra, the Tax Collector would not be required to pay such commissions to anyone other than the Tax Assessor, unless the Tax Collector will recognize the assignment and will consent to pay the commissions to the assignee, which would be a matter to be resolved entirely between the immediate parties concerned.
3. Under the provisions of Act No. 344 of the 1951 Regular Session of the Legislature, which is now Title 51, Sections 87(1)-(7), Code of Alabama Recompiled 1958, which is applicable to the assessment of property taxes in counties

having a population of less than 400,000, and particularly Section 87(2) of Title 51, supra, the Tax Assessor in the preparation of current tax rolls may use for the purpose of assessment of any real estate, or personal property where such personal property is used in or about the curtilage of a home, the assessment return for the preceding year, including the name of the owner, description of the property and assessed value, and without another return and assessment being made, by stamping or printing or otherwise noting on the tax return for the preceding year that such assessment for the current year is the same as that of the preceding year, unless improvements have been made or a change has otherwise been made in the status of the property during the preceding tax year.

4. Under Act No. 344, supra, the taxpayer in returning, and the Tax Assessor in assessing, personal property, other than that "used in and about the curtilage of a home," would be required each year to follow the general provisions and the usual procedure as is set out in Sections 38 and 45, and other applicable sections of Chapter 7, Title 51, Code of Alabama Recompiled 1958.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of August 10, 1964, is as follows:

"Can a Tax Assessor of Alabama who is assessing taxes on a commission under Title 51, paragraph 30, of the 1940 Revenue Code of Alabama and operating under the provisions of Act 344, Legislature of Alabama, Regular Session, 1951, make a legal consignment of his commission as Tax Assessor.

"If your answer is in the affirmative, would a consignment made by a Tax Assessor of his commission for assessing taxes due for the tax year beginning October 1, 1964, and ending October 1, 1965, made after the third Monday in January, 1965, be a legal consignment on part of his commissions for said tax year, payable by the Tax Collector on or after October 1, 1965.

"Are not all assessments of **real and personal** property wherein there has been no change in said assessments in any form considered automatically assessed by the Tax Assessor as of October 1, if said Assessor is assessing taxes under the provisions of Act 344 of the 1951 Regular Session of the Legislature of Alabama.

"I will greatly appreciate an official opinion on this matter at your very earliest convenience and if possible, before October 1, 1964."

Title 51, Section 30, Code of Alabama 1940, Recompiled 1958, provides for the payment of commissions to the Tax Assessor by the Tax Collector, where the Tax Assessor is paid on a fee basis, in material part, as follows:

"The tax assessor shall be entitled to **receive from the tax collector**, out of the first money collected by him, giving duplicate receipts therefor, one of which receipts shall be forwarded to the comptroller by the tax collector, **the following commissions:** In counties where the collections, not including taxes on real estate bid in by the state at tax sales, and taxes which would be due on property except for the provisions of the law exempting homesteads from state taxes, do not exceed twelve thousand dollars, the rate shall be ten percent on the first five thousand dollars, five percent on the next four thousand dollars, and four percent on the remainder.

"The commission herein provided for is to be calculated on collections for real property and personal property, except motor vehicles, for the general fund of the state and county. In counties where collections, not including taxes on property bid in by the state at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from state taxes, exceed twelve thousand dollars, the commission shall be as above declared up to twelve thousand dollars, and one and one-half percent on the remainder up to fifteen thousand dollars, and one percent on the remainder above fifteen thousand dollars. The commissions for assessment of taxes on motor vehicles for the general fund of the state and county shall be calculated on the same basis and at the same rate as provided for the assessment of taxes on real property and personal property other than motor vehicles for the general fund of the state and county. The amount of the commission on taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from state taxes shall inure to the benefit of the general fund of the state only, and shall be covered into the state treasury to the credit of said fund. He shall also be entitled to receive two percent on all collections made by the tax collector of special taxes, whether such special taxes be levied for the state or county, to be paid out of such special taxes.

"The tax assessor shall receive two percent commission on all special county or district taxes levied for school purposes; but he shall not receive such commissions on such special school taxes unless he has properly apportioned such special taxes." (Emphasis supplied)

The payment of the commissions, where the Tax Assessor is paid on a fee basis, and has earned them as is provided by the statute, is then a matter between the Tax Collector and the Tax Assessor. Thus, in answering your first question, I wish to state that I can find nothing in the applicable statutes which would prevent a Tax Assessor from

making a valid assignment of the commissions already earned by him for the tax year involved under Section 30, supra, as between himself and the assignee. However, under Section 30, supra, the Tax Collector is obligated to pay the commissions only to the Tax Assessor, with the receipts forwarded to the comptroller. On the other hand, there is nothing in these statutes which would prohibit the Tax Collector from paying the commissions to the assignee under such an assignment, if the Tax Collector is willing to do so. Under the circumstances, it would be purely a matter of the Tax Assessor obtaining the consent of the Tax Collector to make such payments accordingly, as the assignment as between the Tax Assessor and the assignee would not be binding on the Tax Collector, unless he chooses to recognize it.

Your second question appears also to be answered by the foregoing. It appears that the Tax Assessor could make a valid assignment, as between himself and the assignee, of the commissions **due him at the end of the tax year and on October 1, at any time during the tax year after he has earned the commissions by making the assessments, and before they are paid to him by the Tax Collector.**

In reference to your third question, it appears that your county is one of the counties in which the taxing authorities have elected to make assessments under the provisions of Act No. 344 of the 1951 Regular Session of the Legislature, which is now Title 51, Sections 87(1)-(7), Code of Alabama Recompiled 1958, which is applicable to the assessment of property taxes in counties having a population of less than 400,000. Under Section 87(2) of Title 51, supra, the Tax Assessor in preparation of the current tax roles is authorized to use for the current tax year any assessment return for the preceding year and without another assessment or return being made, as to the name of the owner, the description of the property, and the assessed value, by stamping or printing or otherwise noting on the tax return for the preceding year that such assessment for the current year is the same as that for the preceding year. And while this would be applicable to all assessments of real property, it would apply only to such personal property as is "used in and about the curtilage of a home." This would, however, not apply where improvements have been made or where there has otherwise been a change in the status of the property during the preceding year, which would necessitate a return and an assessment to be made for the current year under the regular procedure found in Sections 38 and 45 and other applicable Sections of Chapter 7, Title 51, Code of Alabama Recompiled 1958. In proceedings under Act No. 344, supra, and Section 87(2) of Title 51, supra, and where there is no change, you could not consider the property involved to be automatically assessed for the current year, as it would be necessary for you to note on the assessment return for the preceding year that the assessment is the same for the current year as is required in Section 87(2).

Under Act No. 344, supra, the taxpayer in returning personal property and the Tax Assessor in assessing personal property, other

than that "used in or about the curtilage of a home," would be required to follow each year the regularly prescribed procedure under Chapter 7, Title 51, *supra*.

Your third question is answered accordingly.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 23, 1964

Honorable S. K. Adams
Judge of Probate
Dale County Court House
Ozark, Alabama

License Taxes — Electrical and Gas Appliance Repair Shops

1. Where a person is engaged in the business of repairing the electrical, gas and mechanical appliances described in Title 51, Section 511, Code of Alabama 1940, Recompiled 1958, and carries only his tools on his truck, and does not make a practice of doing the repair work in or on his truck or does not otherwise maintain in the county a repair "shop," but makes such repairs in the homes or places of business of his customers, then he is not due to pay the license tax under Section 511, *supra*.
2. Where an appliance repairman's truck is equipped for repair work, and he does repair work in or on his truck, then his truck would constitute a "shop" such as is contemplated by Section 511 of Title 51, *supra*, and he would be due to pay the license tax thereunder, even though he does not otherwise have a place of business in the county.
3. The plumber's license tax under Title 51, Section 574, Code of Alabama 1940, Recompiled 1958, is a separate and distinct license from the license tax levied under Title 51, Section 511, *supra*, and under Title 51, Sections 838 and 839, Code of Alabama 1940, Recompiled 1958, the fact that the person involved has paid the plumber's license would have no bearing whatever on whether or not the license under Section 511, *supra*, was also due to be paid by such person.
4. Former opinions of this office reported in Quarterly Report of the Attorney General, Vol. 14, and at pages 98 and 258, respectively, distinguished.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of September 3, 1964, is as follows:

"I would like to have an answer to the following question.

" 'If a plumber and electrician doing business from his truck and does not have a place of business and buys a license under Section 574, Title 51, is he then required to buy a license under Section 511, Title 51? In other words is he required to buy both licenses to do plumbing and electrical repairs where he does not have a place of business?' "

Further information secured from you over the telephone was to the effect that the people to whom you refer in your request are not engaged in selling these electrical, gas and mechanical appliances, but are engaged only in the business of repairing such appliances, together with doing a plumbing business for which they have paid the plumber's license tax under Title 51, Section 574, *supra*. You have also confirmed that these people do not have a place of business in the county, unless the trucks which they use in such businesses can be said to be a place of business.

You have further stated that you cannot say at this time whether these people have vises, threaders, pipe cutters, lathes or other devices or machines attached to their trucks which are used in making the repairs, or if they make a practice of doing the repair work in or on their trucks. It is essential that you obtain this information before making a final determination in such cases, for the answer to your question would depend in each instance upon the facts.

The license tax under Title 51, Section 511, Code of Alabama 1940, Recompiled 1958, is levied, as follows:

"For each dealer in electric, gas or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, or for each electric or gas repair, or electrical or gas supply shop: In cities of one hundred thousand inhabitants or over, thirty dollars; in cities of fifty thousand and less than one hundred thousand inhabitants, twenty dollars; in cities of ten thousand less than fifty thousand inhabitants, ten dollars; in places of less than ten thousand inhabitants, whether incorporated or not, five dollars."

This license tax statute insofar as it is applicable here is directed at the privilege of maintaining a "shop" where the electric, gas and other mechanical appliances referred to therein are repaired. Your question then relates mainly to what might be considered to be a "shop" or place of business for the purpose of Section 511, where such appliances are repaired.

The plumber's license tax levied under Title 51, Section 574, Code of Alabama 1940, Recompiled 1958, is an entirely separate and distinct license tax from that levied under Section 511, and the fact that the people

to whom you refer have paid the plumber's license tax would be of no concern in determining whether the license under Section 511 is due. The payment of a license for engaging in one business would not excuse the licensee from paying a license also for engaging in another or other businesses, where a separate license is called for as to each of such businesses, which is the case here. **State v. Woodham** (decided June 18, 1964), 166 So. 2d 391, 394, Biennial Report of the Attorney General, 1936-38, page 738, Title 51, Sections 838 and 839, Code of Alabama 1940, Recompiled 1958. Furthermore, the liability for the plumber's license under Section 574, *supra*, does not depend on whether the plumber has a place of business, for the test has been held to be whether the person involved is merely "doing business as a plumber." Biennial Report of the Attorney General, 1934-36, page 393. We can, therefore, forget about the fact that the person or persons involved have paid the plumber's license, in determining whether they are liable for the license under Section 511, *supra*.

The question of importance then is whether the people to whom you refer do the repair work in or on their trucks. This does have a great deal of significance, as it has been held on several occasions that a truck under certain circumstances can be a place of business, and it follows, also a shop, for the purpose of the license tax laws of this State. See Quarterly Report of the Attorney General, Volume 14, page 258, also see Quarterly Reports of the Attorney General, Volume 1, page 255, Volume 11, page 126, Volume 17, page 49, and Volume 112, page 17, and **State v. Coca Cola Bottling Works**, 29 Ala. App. 508, 198 So. 363.

In a case where a repairman had no regular place of business in the county and he was only carrying his tools on his truck, and did not do the repair work in or on the truck this office held that the license tax under Section 511, *supra*, insofar as it applies to one maintaining an electrical, gas or mechanical appliance repair "shop," would not be due by such a repairman. Quarterly Report of the Attorney General, Volume 14, page 98.

However, as reported in the same Volume, and a very short time thereafter, this office distinguished that opinion by holding that where a repairman's truck was specially equipped for such repair work, and where he did his repair work in or on his truck, then he would be due to pay this license tax as the truck under such circumstances would in effect constitute a repair "shop" as is contemplated by Section 511. Quarterly Report of the Attorney General, Volume 14, page 258. Moreover, this latter opinion is the very latest opinion of this office pertaining to the subject matter.

The opinion in Quarterly Report of the Attorney General, Volume 14, page 258, is also strengthened by the opinions and authorities which have already been hereinabove cited and which hold that a truck can also under certain other circumstances constitute a place of business for the purpose of our state and county license tax laws. Quarterly Report of the Attorney General, Volume 112, page 17, etc.

Your question then is answered to the effect that where the repairman only uses his truck to carry his tools and he does not make a practice of using it as a place in or on which he does the repair work, or otherwise does not maintain a "shop" in the county, but does such work in the homes or places of business of his customers, he would not be required to pay the license tax under Section 511. Quarterly Report of the Attorney General, Volume 14, page 98. If, however, the repairman makes a practice of using his truck as his repair "shop," by performing the repair work in or on the truck, then he would be liable for the license tax for maintaining an electrical, gas or other mechanical appliance repair "shop" under Section 511. Quarterly Report of the Attorney General, Volume 14, page 258.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 24, 1964

Hon. Carl E. Sellers
Judge of Probate
Houston County
Dothan, Alabama

Costs and Fees — Inquests — Insane Persons — Jurors —
Probate Court.

1. Jurors in lunacy inquisitions paid under the provisions of Title 11, Section 16, Code of Alabama Recompiled 1958.
2. Jurors and probate court paid on certificate of judge of probate.

Opinion by Assistant Attorney General Webb.

Dear Judge Sellers:

I have received your letter of August 25, 1964, in which you request my opinion as follows:

"Several questions have come to my attention in the administration of my duties as Probate Judge of Houston County, Alabama, regarding the pay of jurors summoned in the Probate Court. I would, therefore, respectfully request answers to the following questions:

- "1. When jurors are summoned under provisions of Title 21, Section 12, Code of Alabama 1940 as amended, are the jurors entitled to receive \$5.00 per day of attendance as is provided in Title 11, Section 16, Code of Alabama 1940 as amended, notwithstanding the provisions of Title 11, Section 17, Code of Alabama 1940 as amended?

"2. To whom is the certificate of the Judge of Probate, as is referred to in Title 11, Section 16, Code of Alabama, to be presented for payment?

"3. Does the phrase 'Be paid in the same manner as jurors in the Circuit Court,' contained in Title 11, Section 17, mean that the Clerk of the Circuit Court is to handle the actual disbursement of the jurors' fees for attendance in the Probate Court?

"May we have a categorical answer or explanation to the above questions at your earliest convenience."

Title 11, Section 17, Code of Alabama Recompiled 1958, provides as follows:

"Jurors in the probate court are entitled to the same pay as in the circuit court, **except as herein otherwise provided**, upon the certificate of the judge of probate stating the number of miles traveled, and the amount of compensation to which they are entitled, and be paid in the same manner as jurors in the circuit court." (Emphasis supplied.)

The provisions otherwise provided for payment of jurors in lunacy inquisitions are contained in Title 11, Section 16, which states that the jurors are "entitled to receive five dollars per day of attendance, to be paid on the certificate of the judge of probate, out of the county treasury." I am, therefore, of the opinion that your first question should be answered in the affirmative. Biennial Report of Attorney General, 1930-32, page 117.

In answer to your second question, I am of the opinion that the certificate of the judge of probate referred to in Title 11, Section 16, supra, should be presented to the county treasurer for payment, under the provisions of Title 12, Section 33, Code of Alabama Recompiled 1958, or the county depository created in lieu thereof, under the provisions of Title 12, Section 48, Code of Alabama Recompiled 1958.

With regard to your third question, I am of the opinion that the provisions of Title 11, Section 17, supra, regarding payment of jurors' certificates in the same manner as payment for jurors in the circuit court relates only to the manner in which payment is to be made and has nothing to do with the duties of the circuit clerk. Payment is to be made on certificate of judge of probate.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

September 24, 1964

Honorable Phillip J. Hamm
Commissioner of Revenue
Department of Revenue
Montgomery, Alabama

Taxation — Exemptions — Ad Valorem taxes.

Under Title 51, Section 7, as amended, Code of Alabama 1940, Recomplied 1958, application for exemption from ad valorem tax of a plant, industry or factory or extensions thereof, including the machinery and equipment, may be made by either the owner-lessor of the property or the lessee-operator having control of the manufacturing activity, except where there exists a parent-subsidiary relationship in which case the owners of the property involved must make application for exemption of their respective property.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of September 16, 1964, is as follows:

"A development corporation (not organized under the Cater and Wallace Acts) was formed for the purpose of acquiring land and a building to be put to industrial purposes. The corporation leased such land and building to a corporation which in turn installed certain machinery and equipment owned by the lessee corporation in such leased building for the purpose of operating a manufacturing activity coming within the purview of Title 51, Section 6, Code of Alabama 1940. There is no parent-subsidiary relationship between the lessor and lessee.

"1. Is the building owned by the lessor corporation subject to an ad valorem tax exemption under the authority of Title 51, Section 6, Code of Alabama 1940 and if so, which corporation should apply for such exemption?

"2. If the lessor corporation owns the machinery and equipment as well as the building and leases the complete plant to the lessee corporation, is the building, machinery and equipment subject to an ad valorem tax exemption under Section 6, supra, and if so, which corporation should apply for such exemption?

"Since we have an application now pending wherein the facts are identical with those set out in one of the questions above and since a determination must be made by the Commissioner of Revenue as to the granting of such exemption on or before September 30, 1964, it is respectfully requested that an official opinion be rendered as soon as possible."

It is my opinion that both of your questions should be answered in the affirmative and that either the lessor corporation or the lessee corporation may apply for the exemption. In reaching this conclusion, I assume that the lessee corporation, in operating the manufacturing activity, will have control of the property involved.

Title 51, Section 6, as amended, Code of Alabama 1940, Recompiled 1958, authorizes the Department of Revenue to exempt from ad valorem taxes for state purposes " . . . each such plant, industry and factory, and extension thereof or additions thereto, **including** the works, machinery and all other equipment constituting a part of, or used in connection with, any such plant, industry or factory, or extension thereof or addition thereto, for a period of not exceeding ten years from the date of completion of such plant, industry or factory, or extensions thereof, or additions thereto. . . ."

Title 51, Section 7, as amended, Code of Alabama 1940, Recompiled 1958, provides, in part, as follows:

"§ 7. Application for such exemption.—In order to obtain the benefits of the exemption and remittance provided for in the preceding section, the person, firm or corporation **owning or controlling**, or proposing to **own or control**, any such factory or plant must make application in writing to the department of revenue," (Emphasis added.)

It is my opinion that from the language in Sections 6 and 7, *supra*, the legislative intent is clear that it is not a prerequisite to obtaining an exemption that the owner of the property must also be the operator of the plant, industry, or factory. It is the property to which the privilege of the exemption is extended and the exemption should not be denied merely because the property is leased to another who puts it to such use as to entitle it to the exemption authorized by Section 6, *supra*.

In Quarterly Report of the Attorney General, Volume 93, page 43, after quoting from Sections 6 and 7, *supra*, it is stated:

"It is obvious that the primary object and purpose of the above provisions of law and the intent of the Legislature were to attract new industry to the State of Alabama and encourage expansions and additions thereto by authorizing the Department of Revenue to grant exemptions to qualified industries from ad valorem tax for state purposes for a period up to ten years from the date of completion of the plant, industry, or factory, or expansion or addition. While it is true that exemption statutes are to be strictly construed against the claimant thereof and in favor of the taxing authority, it is also true that a literal interpretation should not be adopted when it would defeat the purpose of a statute, if any other reasonable construction can be given. **Touart v. American Cyanamid Company**, 250 Ala. 551, 35 So. 2d 484."

The opinion in Volume 93, *supra*, also quotes from the opinion reported in Quarterly Report of the Attorney General, Volume 68, page 22, as follows:

"It is the property which is exempt, not the owner of the plant, industry, or factory. Of course, it is the owner who derives the benefit from the exemption, but ad valorem taxation or the exemption therefrom follows the property regardless of the owner thereof. Taxes assessed against property create a personal liability of the owner and are a lien against the property duly assessed. **Wiggins Estate Co., Inc., et al. v. Jeffery et al.**, 246 Ala. 183, 19 So. 2d 769. If the property is exempt from taxation, no personal liability arises nor is there a lien against such property."

Therefore, it is my opinion that the building referred to in question 1 and the complete plant referred to in question 2 may be exempt from ad valorem tax in accordance with Section 6, *supra*, and that either the owner of the property or the lessee thereof who operates the plant, industry, or factory, may file application for the exemption under Section 7, *supra*. However, with respect to question 1, in order to eliminate two applications and two exemption orders, one each for the building and one each for the machinery and equipment, it is suggested that the lessee corporation apply for the exemption for the building as well as for the machinery and equipment. The application for the exemption should refer to the lease agreement. Of course, under the expressed provisions of Section 6, *supra*, in no event can the land on which such plant or factory is located be exempted.

In your request, you say that "There is no parent-subsidary relationship between the lessor and lessee." Apparently, this is mentioned because of the last sentence of Section 7, *supra*, added by Act No. 477, Acts of Alabama 1959, page 1196, which provides as follows:

"If a building, plant, or factory is owned by a corporation, and its subsidiary or parent company operates the plant or factory and owns the works, machinery, or equipment operated therein, a separate application shall be made by each owner, and a separate exemption may be granted."

While it may be argued that the provisions quoted above seems to indicate that only the owner of the property should apply for the exemption, it is to be noted that while Act No. 477, *supra*, amended Section 7, *supra*, by adding the above provision, said Act reenacted that provision of Section 7, *supra*, which provides that the person, firm or corporation **owning or controlling** such factory or plant must make application. It is my opinion that this latter provision still has a field of operation and that the last sentence of Section 7, *supra*, is applicable only where there exists a parent-subsidary relationship. Any other interpretation would mean that the words "or controlling" are meaningless and written out of the statute. The Legislature will not be presumed to have used language in a statute without any meaning or

application or to have done a vain and useless thing. **McDonald v. State**, 32 Ala. App. 606, 28 So. 2d 805; **Haralson v. State ex rel. King**, 260 Ala. 473, 71 So. 2d 79; **In re Opinion of the Justices**, 267 Ala. 114, 100 So. 2d. 681.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 28, 1964

Honorable Billy Patton
Chairman, Jefferson County
Board of Equalization
County Court House
Birmingham 3, Alabama

Taxation — Boards of Equalization — Leases —
Assessments — Property.

1. Under Title 51, Section 142, Code of Alabama 1940, Recompiled 1958, the authority to assess all property belonging to public utilities has been given exclusively to the State Department of Revenue, and such assessments are not within the province of County Boards of Equalization.

2. Where, however, buildings are erected or improvements are placed by a lessee on lands belonging to a public utility, and where it is agreed between the lessee and the public utility that they are to remain the property of the lessee, and can be removed by him, then such buildings and improvements are regarded as the personal property of the lessee, and can be assessed as such by the local taxing authorities. Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of August 10, 1964, is as follows:

"Our Board would like to request that you issue an official opinion concerning the question of whether or not the Jefferson County Board of Equalization has the authority to assess a building on leased property to the lessee, rather than the lessor, if the lease is written so that the improvements belong to the lessee and he is responsible for taxes on these improvements."

Additional information furnished by you concerning inquiry and your letter to this office of August 31, 1964, is as follows:

"The opinion requested in the above-mentioned letter is needed in relation to a case in which the land is owned by a public utility, i.e., a railroad and leased to a private individual over a period of years. The private individual owns the improvements and they have been conveyed from one individual to another within the past five years. They have been on the tax roll as improvements on leased land for a period of years.

"Our question was brought about because we, the Jefferson County Board of Equalization, raised the assessed valuation on these parcels. Now the individual is protesting under the assumption that it is non-taxable since it is on public utility land."

Under the provisions of Title 51, Section 142, Code of Alabama 1940, Recompiled 1958, the right and authority to assess for the purpose of ad valorem taxation the property, both real and personal, of all railroads and other public utilities has been given by the State Legislature exclusively to the State Department of Revenue, and, consequently, the Board of Equalization would not have the authority to assess any property belonging to a public utility. Thus, in the cases to which you refer, the land owned by public utilities could not be assessed by the Board of Equalization. Thus, the only way that the Board of Equalization could come into the picture would be for it to be clearly determined that the buildings and improvements erected or placed on the land by the lessee did not become a part of the land and under the rental agreement remained the property of the lessee. If this be the case, then the Board of Equalization can assess the buildings and improvements as the property of the lessee apart and separately from the land, which would have to be assessed by the State Department of Revenue.

The general rule is to the effect that where buildings or other improvements are constructed by one person on the land of another that such improvements become a part of the realty and may not be taxed to the builder or the lessee, but are taxable to the land owner as a part of the real estate. 32 Am. Jur., Landlord & Tenant, Section 288; 61 C. J., page 187, Section 150; 61 C. J., page 209, Section 183; 51 C. J. S., page 1138, Section 395; Quarterly Report of the Attorney General Volume 29, page 45; Quarterly Report of the Attorney General, Volume 36, page 62.

Title 51, Section 1(b), Code of Alabama 1940, also provides in this respect, as follows:

"The term 'real property' shall be held to mean and include not only land, city, town, and village lots, but also all other things thereunto pertaining, and all structures, and all other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or lot."

A very important exception to this general rule is stated in 27 Am. Jur., "Improvements," Section 4, as follows:

"§4. EFFECT OF AGGREGEMENT WITH LANDOWNER.—An exception to the general rule that improvements belong to the owner of the land is found in the well established principle that a structure erected by one man on the land of another, with his permission, on an agreement or understanding that it may be removed at the pleasure of the builder, does not become a part of the real estate, **but continues to be a personal chattel and the property of the person who erects it,** and may be removed by him at least, if it is readily removable. **Buildings and other improvements placed upon real estate may be treated as movable personal property where such was the intention of the contracting parties** and where such intention is clearly expressed in the contract of the parties with reference thereto." (Emphasis supplied.)

This exception to the general rule has been universally accepted and is also an established principle in Alabama. **Foster v. Nabe**, 4 Ala. 402; **Middleton v. Alabama Power Company**, 196 Ala. 1, 71 So. 461; Quarterly Report of Attorney General, Volume 90, page 10, 51 C. J. S., page 1138, Section 395; 13A Alabama Digest, "Landlord and Tenants," Section 157, et seq.

Where buildings on rented property are owned by the lessee they would not under this exception to the general rule be included within the definition of "real property," under Section 1(b) of Title 51, supra, insofar as the owner of the land is concerned, as they would not "pass to a vendee by the conveyance of the land or lot," as they would remain the property of the lessee. **Brookley Manor v. State**, 265 Ala. 141, 90 So. 2d 161; Quarterly Report of the Attorney General, Volume 90, page 10.

The foregoing being considered, and in view of the fact that you state that, under the written agreements between the public utilities and the lessees, the buildings and improvements erected or placed on the land by the lessees are to remain the property of the lessees, and that they would have the right to remove them, then under the above-stated authorities it would appear that the Board of Equalization would have the right to assess such buildings and improvements as the personal property of the lessees, although the State Department of Revenue would be required to assess the land separately and apart therefrom as the property of the public utilities.

Your question is answered accordingly.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 29, 1964

Hon. John P. Kohn
County Attorney
Montgomery County
Montgomery, Alabama

Licenses — Motor Vehicles — Delinquency —
Computing Time

1. Under Title 51, Section 710, Code of Alabama 1940, Recompiled 1958, the delinquent date as to the payment of motor vehicle license has been definitely set as "November 16," and cannot be extended even though November 15 (the last day for payment without penalty) falls on a Sunday or a legal holiday in any particular year.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of September 22, 1964, is as follows:

"The Board of Revenue of Montgomery County has directed me to ask you for an official opinion on the following matter: This year November 15 falls on Sunday. The date for selling automobile license tags each year, as you know, is from October 1 to November 15. The question is, may tags be sold on the 16th day of November without adding a penalty?

"Your prompt answer will be deeply appreciated as we would like this information for the current year, commencing October 1."

The fact that November 15, 1964, falls on a Sunday would not extend the time for the payment, without penalty for delinquency of the motor vehicle license taxes levied under Title 51, Chapter 20, Article 8, Code of Alabama 1940, Recompiled 1958, beyond November 15. Thus, if the motor vehicle license is not paid until Monday, November 16, the licensee would be subject to the penalty for delinquency, regardless of the fact that November 15 falls on Sunday or a legal holiday in any particular year.

Section 710 of Title 51, Code of Alabama 1940, provides as follows: "All motor vehicle licenses under this article shall become due on the first day of October of each year, **and delinquent on November 16 (sixteenth) next thereafter.**"

The last day then for the payment of motor vehicle licenses without delinquency has been clearly set by the Legislature as November 15, as the license is said to be "delinquent on November 16," without any exceptions being made. Under similar circumstances it has been clearly held that where a day or date certain has been set by the

Legislature as the delinquent day as distinguished from a certain number of days being designated, i.e., thirty days, then the rule as to computing time (Title 1, Section 12, Code of Alabama 1940, Recompiled 1958) does not apply. Quarterly Reports of Attorney General, Volumes 97 and 26, pages 15 and 9, respectively. Also see **State ex rel Henry, Commissioner of Licenses, v. Hotel Tutwiler Operating Company**, 230 Ala. 657, 162 So. 365, and **McDowell v. Henry**, 238 Ala. 663, 193 So. 108.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

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November 16 even where November 15 falls on Sunday 74

“Tear gas and other bombs” does not include pen

type tear gas gun 35

INFORMAL OPINIONS

During the period covered by this Quarterly Report of the Attorney General, July 1, 1964 through September 30, 1964, the Attorney General rendered the following informal opinions. These informal opinions are not published in the Quarterly Report.

Subject Matter	Addressee	Date	File No.
BONDS			
Bail — Sureties	George E. Trawick	Aug. 19	894
Barbers — Payee	J. F. Mayo	Aug. 26	883
CORPORATIONS			
Registration — Funds	John D. McLaughlin	Jul. 7	769
COUNTIES			
Bids — Contracts	C. B. Guthrie	Sept. 9	920
Constitution — Creation	Louis Chastain	Aug. 7	851
Employees — Vacation Pay	Slaughter McMahan	Aug. 28	905
Juries — Card Data	Walter E. Bass	Aug. 11	854
Legal Notices — Rates	Wiley Hickman	Aug. 11	315
Marshal — Constitutionality	Clayton Carter	Aug. 19	694
Marshal — Constitutionality	Clayton Carter	Aug. 26	694
Probate Judge — Contracts	A. H. Jarvis	Aug. 28	907
Sheriffs — Jails	W. C. Johnson	Aug. 26	426
CRIMINAL LAW			
Attorneys — Indigents	Joseph Wershba	Aug. 18	890
Blood Tests — Parenty	Brooks H. Bishop	Jul. 27	811
ELECTIONS			
Absentees — Military	W. M. Griffin	Jul. 29	812
Absentees — Military	Lewey Stephens	Jul. 29	804
Absentees — Military	George E. Stone, Jr.	Aug. 6	820
Absentees — Registrations	Robert Dennis Thomason	Aug. 10	848

Absentees — Requirements	Franklin H. Eaton	Aug. 27	897
Absentees — Time	Alton B. Hollis	Sept. 15	614
Conviction — Disqualification	James W. Kynes	Sept. 3	Atty. Gen.
Expenses — Filing	W. Roy Stokes	Aug. 18	875
Military — Residence	Fred W. Harrison	Jul. 28	807
Military — Residence	Aubry L. Reeves	Sept. 8	924
Municipality — Annexation	Norman K. Brown	Sept. 2	796
Municipality — Primaries	Buford L. Copeland	Jul. 13	776
Municipality — Procedure	R. M. Denty, Sr.	Jul. 17	797
Municipality — Residence	Walter V. Cofield	Jul. 7	150
Municipality — Residence	H. D. Darden	Jul. 13	775
Municipality — Residence	Alvis Hamric	Jul. 21	792
Municipality — Time	Buford L. Copeland	Jul. 9	776
Registers — Absentees	O. B. Griffin	Aug. 5	824
Registration — Municipalities	Jesse H. McConnell	Aug. 25	885
Registration — Time	Jesse H. McConnell	Aug. 28	885
Voters — Machines	Charles L. Murphree	Aug. 5	823
HEALTH AND HEALTH DEPARTMENT			
Healing Arts — Chiropractors	Robert B. Throckmorton	Aug. 3	838
Physicians — Chiropractors	Ira L. Myers	Sept. 15	Health Dept.
Regulations — Food Services	Russell Wright	Sept. 22	Health Dept.
INSURANCE			
Deposits — Certificates	Mary Texas Garner	Jul. 6	St. Treas.
Deposits — Certificates	Ira L. Burleson	Aug. 14	362
Deposits — Release	Mary Texas Garner	Aug. 13	St. Treas.
Deposits — Transfer	Mary Texas Garner	Aug. 19	St. Treas.
Deposits — Transfer	Mary Texas Garner	Sept. 16	St. Treas.

Subject Matter	Addressee	Date	File No.
Deposits — Transfer	Mary Texas Garner	Sept. 28	St. Treas.
Escrow — Funds	Mary Texas Garner	Aug. 17	St. Treas.
JUSTICES OF PEACE			
Duties — Jurisdiction	Marshall H. Simms	Sept. 4	909
Jurisdiction — Bad Checks	Robert S. Hammond	Aug. 27	903
Jurisdiction — Motor Vehicles	Tom T. Raybon	Sept. 4	910
MUNICIPALITIES			
Annexation — Elections	Wiley Hickman	Aug. 5	315
Annexation — Time	E. G. Walker, et al.	Aug. 18	879
Assessments — Counties	Bernice H. Centanne	Jul. 1	759
Council — Employees	Charles A. Nix	Aug. 13	805
Courts — Sentences	Albert J. Lingo	Jul. 27	Dept. Pub. Safety
Merger — Schools	Albert Boutwell	Jul. 21	832
Officers and Offices — Lessors	E. C. Morrison	Sept. 2	911
Officers and Offices — Salaries	John Black	Aug. 12	856
Officers and Offices — Subdivisions	A. J. Honeycutt	Sept. 28	962
Ordinances — H'way Patrol	Albert J. Lingo	Jul. 28	Pub. Safety
Ordinances — Residence	Arthur W. Clement	Aug. 10	860
Police — Operations	Thomas J. Aaron	Sept. 2	914
Torts — Employees	G. L. Barger	Sept. 14	934
OFFICERS AND OFFICES			
Hospitals — Employee — Employers	Wanda A. Cribbs	Aug. 5	827
Hospitals — Municipalities	Ralph A. Meade	Aug. 5	234
Municipalities — Solicitors	P. M. Johnston	Sept. 11	928
Solicitors — Attorneys	Donald E. Brulkieweiz	Sept. 28	Sol.

SCHOOLS

Buses — Claims	Aug. 31	896
County Board of Education—		
Compensation		
George H. Roberts	Sept. 1	919
Funds — Lunchrooms	Aug. 6	822
Pupils — Buses	Aug. 28	902
Trustees — Property	Aug. 4	837
Teachers — Reemployment	Aug. 27	Dept. Ed.
Trustees — Term	Jul. 30	801
Raymond E. Faught		

STATE AND STATE DEPARTMENTS

ABC Board — Assignments	Jul. 9	ABC Bd.
ABC Board — Licenses	Aug. 17	ABC Bd.
Departments — Confidential Assistants	Sept. 23	Bldg. Comm.
Employees — Labor Unions	Jul. 15	789
James E. Caldwell		
James E. Caldwell		
Hugh D. Adams		
Martha L. Ware		

TAXATION

Barbers — Licenses	Sept. 18	945
Filing Tax — Mortgage Extension	Jul. 25	843
Licenses — Marriage Counselors	Jul. 13	722
Sales Tax — Municipalities	Sept. 25	812
Matthew H. Drake		
M. Gresham Hale		
George E. Castile		
W. M. Griffin		